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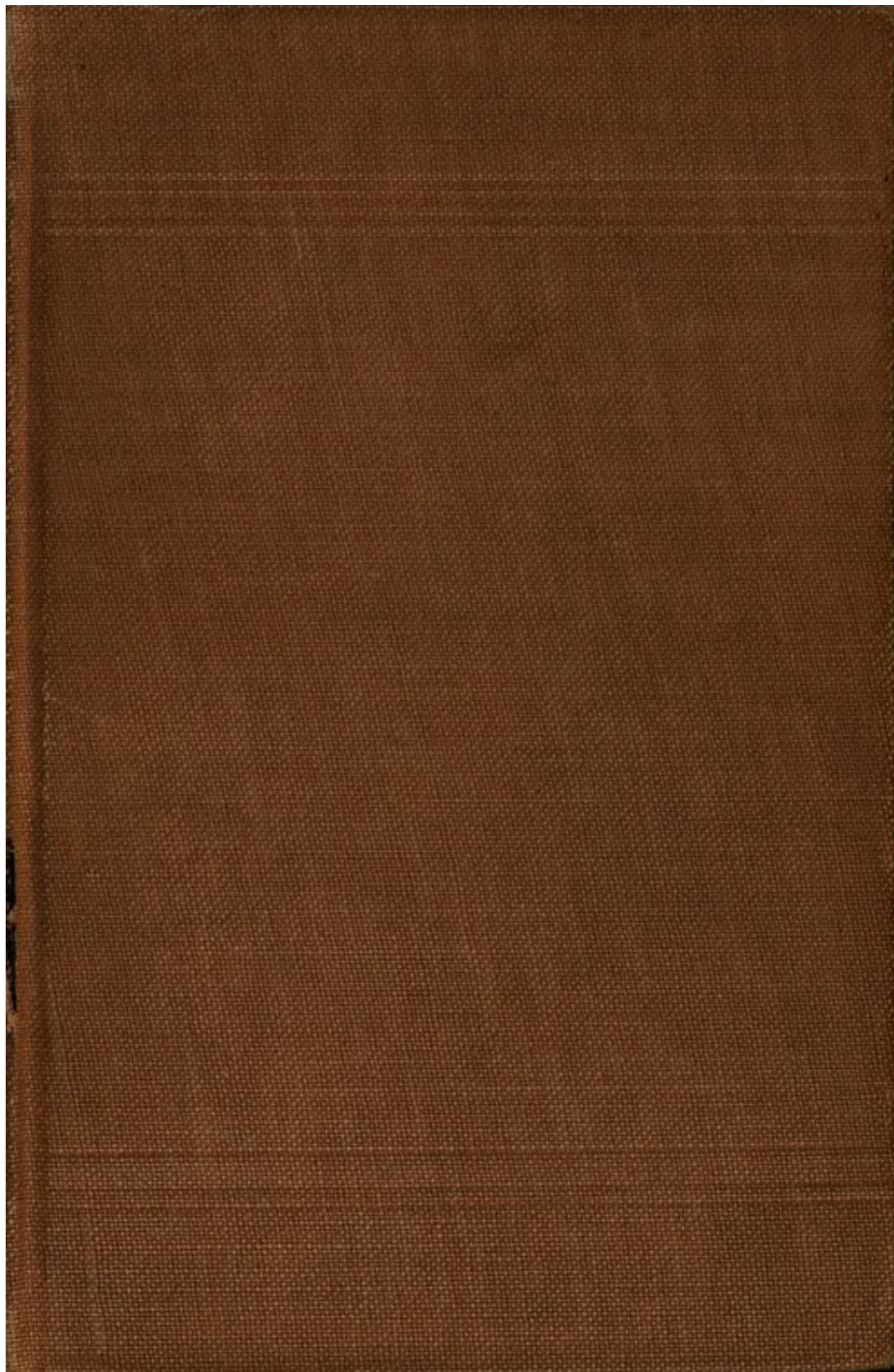
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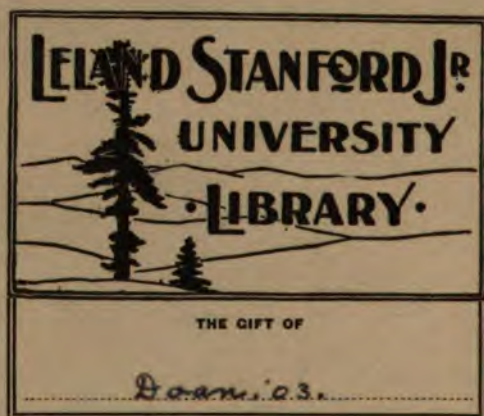
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BY

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IN TWO VOLUMES

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City of Lawrence levied a tax against the petitioner. The court held that such tax was illegal because the McKay Sewing Machine Co. was a partnership and its property was only taxable in the city where its business domicile was.

CASES ON PRIVATE CORPORATIONS.

CHAPTER I.

NATURE OF A CORPORATION.

SECTION I.—WHEREIN IT DIFFERS FROM A PARTNERSHIP.

JOHN C. HOADLEY *v.* COUNTY COMMISSIONERS OF ESSEX.

IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS, NOVEMBER TERM, 1870.

[Reported in 105 Massachusetts Reports 519.]

E. Merwin for the petitioner.

D. Saunders for the respondents.

MORTON, J.¹ The only question presented in this case is, whether the petitioner is liable to be taxed in Lawrence for the shares in the McKay Sewing Machine Association owned by him. This question must be decided by the construction of the statutes regulating taxation, and not upon any considerations of supposed policy or equity; and we are unable to find any provision of statute which makes such shares taxable.

The McKay Sewing Machine Association is not a corporation. It has never received an act of incorporation, nor been organized as a corporation under the general laws. A corporation can only be created and exist by sanction of the legislature. This is a voluntary association of individuals, and its articles of agreement, although they adopt some of the forms of managing the business usual in corporations, constitute a copartnership. It cannot sue

¹The statement of facts and a portion of the opinion relating to the question of double taxation have been omitted.—Ed.

and be sued as a corporation; its members are individually liable for its debts; and it has none of the special attributes which belong to a corporation duly organized under our laws. *Oliver v. Liverpool and London Insurance Co.* 100 Mass. 531; *Tyrrell v. Washburn*, 6 Allen, 466. The provision that each member may sell and transfer his interest, and thus introduce a new partner, though unusual, is not inconsistent with the contract of copartnership.

It is clear, therefore, that shares in this association could not be taxed under the Gen. Sts. c. 11, § 4, as "stocks in a moneyed corporation," even if any such stocks could be taxed to the owners since the passage of the St. of 1865, c. 283. Being a copartnership, the laws applicable to that relation must govern its rights and liabilities; and it follows that the personal property held by it was properly taxable in Boston, where its business is carried on, and not in Lawrence. Gen. Sts. c. 11, § 15; *Little v. Cambridge*, 9 Cush. 298. The petitioner, therefore, was not taxable in Lawrence for his interest in the personal property of the firm.

But the tax in question was assessed upon the market value of his shares, treating them as so many shares of corporate stock. No provisions of statute, or authorities, are cited, by which such a tax can be upheld. The property of each partner in a firm is an undivided interest in all the assets as a tenant in common. For that interest, if the firm is established in this State, he is taxable in the town which is the business domicil of the firm; if it carries on business in another State, he is taxable at his place of residence. *Bemis v. Aldermen of Boston*, 14 Allen, 366. He has no other interest in the firm which is subject to taxation. The fact that, by agreement between the partners, in this case, the share or interest of each partner in the firm is transferable, does not make it taxable specifically. If such shares have a market value larger than the amount of property held by the firm, it is a speculative value, founded upon the expectation of future profits, and is not property which is taxable under our laws.

We are therefore of opinion that the tax assessed by the city of Lawrence upon the petitioner was illegal. We have not deemed it necessary to consider what is the effect of the fact that the legal title to the property of the association is by the articles of agreement vested in McKay as trustee. This fact cannot make the case more favorable for the respondents, because, if the property is to be regarded as property held in trust under the Gen. Sts. c. 11, § 12, cl. 5, it is clear that it is taxable to the trustee, and not to the petitioner.

Writ of *certiorari* to issue.

appellant seeks to charge resp. with money deposited in the Home Sav. Bank on the ground that the bank was a partnership and resp. a partner. Court held that

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the burden to prove was on the appellant to show that the Bank was a partnership.

GIBBS'S ESTATE. HALLSTEAD'S APPEAL.

IN THE SUPREME COURT OF PENNSYLVANIA, OCTOBER 2, 1893.

[Reported in 157 Pennsylvania State Reports 59.]

ARGUED March 15, 1893. Appeal, No. 66, Jan. T., 1893, by W. F. Hallstead, guardian of Mary E. Clapp *et al.*, from decree of O. C. Bradford Co., Sept. T., 1887, No. 20, dismissing exceptions to auditor's report in estate of Henry Gibbs, deceased. Before GREEN, WILLIAMS, MITCHELL, DEAN and THOMPSON, JJ.

Exceptions to report of auditor on exceptions to administrator's account.¹ Before METZGER, P. J., 29th Judicial District, specially presiding.

The case was referred to Stanley W. Little, Esq., as auditor.

Before the auditor, W. F. Hallstead, guardian of Mary E. Clapp *et al.*, claimed to recover from the estate of decedent, Henry Gibbs, the sum of \$2900.46, the amount of a deposit in the Home Savings Bank, of which decedent was a stockholder. The claim was made on the ground that the bank was a general partnership, and that its stockholders were liable as partners for its debts.

Rodney A. Mercur and Everett Warren, Ulysses Mercer, E. N. Willard and Henry A. Knapp with them, for appellant.

D'A. Overton, M. F. Elliott with him, for appellee.

WILLIAMS, J., October 2, 1893. This case involves substantially the same question that was heard and determined in *Hallstead v. Coleman*, 143 Pa. 354. The appellant seeks to charge the estate of Henry Gibbs with money deposited by him, as guardian, in the Home Savings Bank, located at South Waverly, on the theory that the bank was a general partnership and that the decedent was one of the partners. The appellees deny that the Home Savings Bank was a partnership, and assert that the decedent purchased shares of stock in the bank, as and for the shares of stock in an incorporated bank, and not otherwise. At this point it seems desirable to define the words over which this contest extends.

First. What is a corporation? The several answers given by text writers may be reduced to the following formula: A corporation is an artificial person created by law as the representative of those persons, natural or artificial, who contribute to, or become holders of shares in, the property entrusted to it for a common purpose. The creation of a corporation is not within the power of the individuals who subscribe to its stock. It is ex-

¹The report of the auditor has been omitted.—ED.

clusively the work of the law; and the best evidence of the existence of a corporation is the grant of corporate powers by the commonwealth.

Second. What is a corporation *de facto*? It is an apparent corporate organization, asserted to be a corporation by its members and actually acting as such, but lacking the creative fiat of the law. In Taylor on Private Corporations, 145, it is said that a *de facto* corporation may exist "when a body of men are acting as a corporation under color of apparent organization, in pursuance of some charter or enabling act." Their organization may be imperfect, so that upon a *quo warranto* they could not show a sufficient compliance with the law to justify the exercise of corporate powers, but, as to parties dealing with them, and as to each other, they are estopped to deny that they are what they hold themselves out to be. In a recent case in Minnesota, *Finnegan v. The Knights of Labor Building Association*, it was held that a *de facto* corporation exists when these three things concur—namely, a law under which the alleged corporation might be created; an attempt to organize under the law; an assumption and exercise of corporate powers under such attempted organization. In *Church v. Pickett*, 19 N. Y. 482, only two things were held necessary—namely, "the existence of a charter or law under which a corporation with the powers assumed might be lawfully created; and a user by the party to the suit of the rights claimed to be conferred by such a charter or law." Where there has been a substantial compliance with the law the corporation is, of course, *de jure*. Where there has been no substantial compliance, but there has been nevertheless an assumption and exercise of corporate powers in pursuance of an attempted organization, the alleged corporation is such *de facto* only. The Minnesota courts hold the correct rule, and three things are necessary to create the liability: a law or charter under which an organization *de jure* might be effected; an attempt to organize which falls so far short of the requirements of the law or charter as to be ineffectual; an assumption and exercise of corporate powers notwithstanding the failure to comply with the law or charter.

Third. What is a partnership? Perhaps the best definition is that given by Story: a relation created by a "contract between two or more persons to place their money, effects, labor, or skill, or some or all of them, in lawful commerce and divide the profits between them." Its foundation is a contract express or implied. It results from the act of the parties, not from the act of the law. *Hedges's Ap.*, 63 Pa. 273; 17 Am. and Eng. Encycl. of Law, 829; see also 8 W. & S. 63; 16 Ohio, 166; 14

Johns. 318; 49 Ill. 437. But as to third parties one may be held liable as a partner by implication of law arising upon his own acts contrary even to his own intention. Thus the officers and acting members of a corporation *de facto* may be liable as partners if their conduct has led others to trust the concern upon that basis. 47 Conn. 443. But without a contract of partnership, or such acts and declarations as lead others to infer its existence and to extend credit on that basis, there is no foundation on which liability as a partner can rest. The best evidence of the existence of a partnership is the contract creating it. If proof of the contract is not within reach, its existence may be inferred from proof of contribution to the partnership stock. If direct proof of contribution cannot be had it may be inferred from participation in profits. In the absence of all this the acts and declarations of the parties sought to be charged may be resorted to. Participation in profits is not conclusive proof of the existence of the partnership relation (*Edwards v. Tracy*, 62 Pa. 374), but both in England and in this country it is cogent evidence upon the question. It puts the defendant upon his proofs explanatory of the fact. If he is able to show that such participation was referable to some other reason, such as compensation for services rendered by him as agent, broker, salesman or otherwise, the *prima facies* is overcome. So if the participation in the profits is referable to some other relation than that of partnership between the participants, such as membership in a joint-stock association, or a corporation, the effect of proof of participation will be overcome.

In the light of these well-settled rules, let us consider briefly the position of the parties and the important findings of fact made by the learned auditor in this case. The claimant's right to share in the fund in court rested on the theory that the Home Savings Bank in which the money of his wards had been deposited was a partnership, and that the decedent was a partner. The burden of proving the fact that the bank was a partnership was on him; and as was said in *Hallstead v. Coleman*, 143 Pa. 364, "until that proof was given, the defendants were not called upon to enter upon their defence." The proof made upon this subject showed the organization of a bank under the name of the Home Savings Bank, with a president, cashier, and a board of directors. This is the mode of organization usually adopted by corporations, and did not tend to prove a partnership. It was then shown that the decedent bought and held certificates of stock in the bank, after its organization, which recited not the formation of a partnership, but the organization of a bank under the laws of the State, and the division

of its capital into shares of one hundred dollars each. This is not the usual way in which partnerships are created and partners admitted. It is the usual way in which stocks are issued and transferred in corporations. Proof was then made of the receipt by the decedent of several dividends upon his stock. These did not purport to be shares in the profits of firm business, but dividends, declared in the manner usual among corporations, upon the stock of the bank; and were paid by dividend checks drawn under the authority of a board of directors. The only other evidence was the returns made by the officers of the bank under the tax law of 1879, which threw very little light upon the character of the organization of the bank. Upon this proof the questions for the auditor were whether the bank was shown to be a partnership, and the decedent a partner. The bank did business for a number of years and then failed. Its books and papers were in the hands, or subject to the control of, the receiver. The manner of its organization was not shown; the partnership agreement, if any such existed, was not produced. No proof was given that the officers or stockholders claimed, or held out to the public, that the stockholders were partners or the bank a partnership enterprise. It was not alleged that the decedent participated in any manner in the business, or exercised any control over it. The whole case against him rested on the fact that he had purchased shares in a bank, then organized and doing business, and received dividends declared by the directors and paid to him in a cashier's check. We are not surprised that the learned auditor was led to ask: "What is there in all this evidence from the beginning of the business to the failure, tending to prove a partnership?" nor that he answered his own question by holding that this proof was insufficient to establish, *prima facie*, the existence of the partnership relation. On the other hand there was much tending to show that Henry Gibbs understood that he was the holder of stock in an incorporated bank; and that the bank assumed and exercised corporate powers; and was dealt with by the public as a corporation. The form of its certificates, the manner of their transfer, the election of directors by the stockholders, the management of the business of the bank by the directors and the officers elected by them, the mode of declaring and paying dividends, were all suggestive of a corporation. They were not suggestive of a partnership. We are unable therefore to say that the auditor erred in finding that the bank was not shown to be a partnership. The learned judge who heard the exceptions to this report seems to have concurred with the auditor, and we require under such circumstances to be satisfied that

a mistake was made before interfering with the findings. We are not so satisfied; but are of opinion that the state of the evidence justified the auditor's conclusion. This disposes of the whole case.

It is said with earnestness and energy that this is a case in which the depositors deserve protection. We assent to this proposition. We can extend protection to them, however, in accordance with the established rules of law, and in no other manner. What the Home Savings Bank was in its organization, in what capacity those who held its stock were liable to its depositors, are questions not now before us. It may have been a corporation *de jure*, a corporation *de facto*, a joint-stock association, or a general partnership so far as we are able to declare. What we say is that the evidence in this case is not sufficient to make a case, *prima facie*, against Henry Gibbs as a partner, or the bank as a general partnership. It does not appear that the bank was organized as a partnership, conducted business as a partnership, or held itself out to the public as such. It does not appear that Gibbs understood the bank to be other than what his certificates of stock indicated; or that he treated the business of the bank as that of a firm, or exercised the slightest control over, or influence upon it; or misled the appellant or any other depositor by act or word as to his relation to it. What does appear is that he purchased shares of stock in the usual manner, and received some dividends thereon. These circumstances are naturally referable to the relation of a stockholder to a corporation; and, standing alone, are not proof, *prima facie*, of the appellant's proposition that the bank was organized as a partnership, and that the purchase of shares of stock made Gibbs a partner. If he had received profits from a business apparently conducted by a partnership, he would have been put upon his explanation, and, failing to make one, would have been held to be a partner. The burden in that case would have been on him. Having received dividends, declared by a board of directors upon the stock into which the capital of the bank was divided, he could rest securely upon the apparent character of the transaction and the inferences naturally to be drawn from it. The burden of explanation necessary to give another character to the dividend declared, and to the stock on which it was paid, was on him who asserted that such other was the true character of these circumstances.

It was also said in the argument that the recitals in the stock certificates are not evidence of actual incorporation as against a stranger. This must be granted. They do not prove incorporation. But the appellees are not bound, upon the evi-

dence in this case, to prove incorporation. The significant question is, where is the proof that this bank was organized or conducted as a partnership concern? The certificates do not prove that, but the inferences naturally drawn from them tend the other way. It will not do for the appellants to say: "We have shown that the decedent was a stockholder in this bank and received dividends upon his stock, now you must show that the bank was incorporated or be liable to us as a general partner." This is attempting to change the burden of proof. Again the learned counsel says: "This is the sole fact (the form of the certificate) that is before the court, and if it is sufficient to authorize a court to find an incorporation in this case why is it not in any other?" The court below did not find that the bank was a corporation. That question was not before it. It was alleged by the appellant to be a partnership, but the auditor and the judge of the court below regarded the evidence in support of that allegation insufficient to justify a finding that the bank was not "organized by act of the legislature of Pennsylvania," as its certificates alleged, but by the parties as copartners. The appellant failed not because the bank was held to be a corporation, but because it was not shown to be a partnership. Until evidence in support of the appellant's position is given sufficient to lead fairly to the conclusion that the bank was organized as a partnership; or that Henry Gibbs contracted to become a partner when he bought his stock; or that he led the public by his acts and declarations to deal with him or the bank on the basis of his being a partner; there is nothing that makes it the duty of his representatives to enter upon a defence, or that makes it possible for the court to decide upon the character of the bank. In such a state of the evidence, the court can only say, as the court below said in this case, "It is not shown, that the bank is a partnership," and for that reason the claimant fails.

The assignments of error are not sustained and the decree is affirmed.

PEASE'S APPEAL.

Argued March 15, 1893. Appeal, No. 77, Jan. T., 1893, by Edward E. Pease, from decree of O. C. Bradford Co., Sept. T., 1887, No. 20, dismissing exceptions to auditor's report. Before GREEN, WILLIAMS, MITCHELL, DEAN and THOMPSON, JJ.

The facts are the same as in the preceding case.

Martin S. Lynch, N. C. Elsbree and R. H. Williams with him, for appellant.

D'A. Overton, M. F. Elliott with him, for appellee.

WILLIAMS, J., October 2, 1893. This case is fully ruled by the

Appeal of W. F. Hallstead, guardian, etc., in which an opinion is this day filed. It is not necessary to repeat what is there said. It is enough to refer to the opinion in that case for the reasons in support of the decree in this. The assignments of error are not sustained and the decree of the court below is affirmed.

SECTION II.—WHEREIN IT DIFFERS FROM A JOINT-STOCK COMPANY.

LIVERPOOL INSURANCE CO. v. MASSACHUSETTS.

IN THE SUPREME COURT OF THE UNITED STATES, DECEMBER TERM, 1870.

[Reported in 10 Wallace 566.]

ERROR to the Supreme Judicial Court of Massachusetts; the case being this:

A statute of the State just named imposes upon "each fire, marine, and fire and marine insurance company, *incorporated* or *associated* under the laws of any government or State other than one of the United States, a tax of 4 per cent. upon all premiums charged or received on contracts made in this commonwealth for insurance of property." The same statute imposes a tax of but 2 per cent. upon such premiums when the company is incorporated under the laws of any one of the United States other than Massachusetts; upon which premiums, where the company is incorporated by itself, it imposes but 1 per cent.; while no tax is imposed by the laws of the State upon the business of insurances transacted by any natural persons citizens of the same.

With the enactment just mentioned on its statute-book, the State of Massachusetts, in 1868, filed a bill in its Supreme Judicial Court against the Liverpool and London Life and Fire Insurance Company (a company doing a large business in that State), to collect a tax of 4 per cent. on its premiums upon contracts made in Massachusetts for insurance of property, and to restrain the company from doing further business till the tax was paid. The company set up that it was not "incorporated" at all, but was an association under the laws of Great Britain, of natural persons, some of whom were citizens and residents of the country just named; and some citizens and residents of the State of New York; formed for the purpose of conducting the business of insurance under certain deeds of settlement, and having the legal character of a partnership; that accordingly it could

not to be taxed as a "company *incorporated* under the laws of any government or State other than one of the United States;" while, in so far as the discriminating tax of 4 per cent. was sought to be laid against it as a company *associated* simply and not incorporated, it violated, in regard to the members of the company who were subjects of Great Britain, a provision in the treaty of 1815, between that country and the United States, by which it is agreed that the merchants and traders of each nation respectively shall enjoy the *most complete protection and security for their commerce*; and—in regard to the citizens of New York, that provision in section 2, article 4, of the Federal Constitution which secures to the citizens of each State all the privileges and immunities of citizens in the several States.

Of course, if the company was a corporation, the defence failed: and it not being denied that the persons composing the company were British subjects, with certain citizens of New York with rights like theirs, the first question—and the only one if it was resolved affirmatively—was whether the company was a corporation or not.

The company had been originally formed, in May, 1836, in Liverpool, by a "deed of settlement."

This instrument, as far as it could be done without the aid of Parliament, established a company under the name of "The Liverpool Life and Fire Insurance Company," with a capital of £2,000,000 sterling, which was divided into 100,000 shares of £20 each, and declared its purpose to be making insurance on life and against fire. These shares could be sold and transferred, and executors and administrators represented them in the company on the death of the owner. If, by the laws of the association, a share became forfeited, the owner was released from all further liability to the company. The business of the company was to be conducted by a board of directors *exclusively*, and they could make by-laws and change and modify them. There was a covenant that suits might be brought by or against the company in the names of one or more directors, which should bind the stockholders, and that no stockholder would plead in abatement the non-joinder of the others; and it was further covenanted that a judgment so obtained against a director might be made out of the property of any of the stockholders. Numerous other provisions were found in the original articles, which consisted of over a hundred sections, but only those are referred to here which bear on the question which the court had before it. There were also three subsequent deeds of settlement, and three acts of Parliament were passed to give efficiency to the purposes of the association.

The first of these acts provided that the association might sue and be sued in the name of the chairman or deputy chairman of the board of directors; that the stockholders might sue the company as plaintiffs, or be sued by it as defendants. It regulated the manner in which *the shareholders might be made individually liable for the debts of the association*; and it declared that the act should *not be construed to incorporate the company or relieve its members from their individual liability*, except as provided in the act.

The second act of Parliament changed the name of the company to that which it now bears, and authorized it to make contracts by the new name, and it also contained a provision that the act should *not make the company a corporation*; and there was a third act which authorized amalgamation with another company, and which again provides *against its being construed into an act of incorporation or a limited liability partnership*.

The Supreme Judicial Court of Massachusetts gave a decree against the company, and enjoined it from the further prosecution of its business till the taxes found to be due were paid.

The case was now brought to this court on the ground that in its application to the company the statute of Massachusetts was in conflict with the provision of the Constitution, which confers on Congress the right to regulate commerce with foreign nations and among the States, and with that which secures to the citizens of each State all the privileges and immunities of citizens in the several States.

B. R. Curtis and J. G. Abbott for the company, plaintiff in error.

Charles Allen, Attorney-General of Massachusetts, contra.

MILLER, J., delivered the opinion of the court.

The case of *Paul v. Virginia*,¹ decided that the business of insurance, as ordinarily conducted, was not commerce, and that a corporation of one State, having an agency by which it conducted that business in another State, was not engaged in commerce between the States.

It was also held in that case that a corporation was not a citizen within the meaning of that clause of the Constitution, which declares that the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States, and that a corporation created by a State could exercise none of the functions or privileges conferred by its charter in any other State of the Union, except by the comity and consent of the latter.

These propositions dispose of the case before us, if plaintiff

¹ 8 Wallace, 168.

is a foreign corporation, and was, as such, conducting business in the State of Massachusetts, and we proceed to inquire into its character in this regard.

The institution now known as the Liverpool and London Life and Fire Insurance Company, doing an immense business in England and in this country, was first organized at Liverpool by what is there called a deed of settlement, and would here be called articles of association.

It will be seen by reference to the powers of the association, as organized under the deed of settlement, legalized and enlarged by the acts of Parliament, that it possesses many, if not all, the attributes generally found in corporations for pecuniary profit which are deemed essential to their corporate character.

1. It has a distinctive and artificial name by which it can make contracts.

2. It has a statutory provision by which it can sue and be sued in the name of one of its officers as the representative of the whole body, which is bound by the judgment rendered in such suit.

3. It has provision for perpetual succession by the transfer and transmission of the shares of its capital stock, whereby new members are introduced in place of those who die or sell out.

4. Its existence as an entity apart from the shareholders is recognized by the act of Parliament which enables it to sue its shareholders and be sued by them.

The subject of the powers, duties, rights, and liabilities of corporations, their essential nature and character, and their relation to the business transactions of the community, have undergone a change in this country within the last half century, the importance of which can hardly be over-estimated.

They have entered so extensively into the business of the country, the most important part of which is carried on by them, as banking companies, railroad companies, express companies, telegraph companies, insurance companies, etc., and the demand for the use of corporate powers in combining the capital and the energy required to conduct these large operations is so imperative, that both by statute, and by the tendency of the courts to meet the requirements of these public necessities, the law of corporations has been so modified, liberalized, and enlarged, as to constitute a branch of jurisprudence with a code of its own, due mainly to very recent times. To attempt, therefore, to define a corporation, or limit its powers by the rules which prevailed when they were rarely created for any other than municipal purposes, and generally by royal charter, is impossible in this country and at this time.

Most of the States of the Union have general laws by which persons associating themselves together, as the shareholders in this company have done, become a corporation.

The banking business of the States of the Union is now conducted chiefly by corporations organized under a general law of Congress, and it is believed that in all the States the articles of association of this company would, if adopted with the usual formalities, constitute it a corporation under their general laws, or it would become so by such legislative ratification as is given by the acts of Parliament we have mentioned.

To this view it is objected that the association is nothing but a partnership, because its members are liable individually for the debts of the company. But however the law on this subject may be held in England, it is quite certain that the principle of personal liability of the shareholders attaches to a very large proportion of the corporations of this country, and it is a principle which has warm advocates for its universal application when the organization is for pecuniary gain.

So also it is said that the fact that there is no provision either in the deed of settlement or the act of Parliament for the company suing or being sued in its artificial name forbids the corporate idea. But we see no real distinction in this respect between an act of Parliament, which authorized suits in the name of the Liverpool and London Fire and Life Insurance Company, and that which authorized suit against that company in the name of its principal officer. If it can contract in the artificial name and sue and be sued in the name of its officers on those contracts, it is in effect the same, for process would have to be served on some such officer even if the suit were in the artificial name.

It is also urged that the several acts of Parliament we have mentioned expressly declare that they shall not be held to constitute the body a corporation.

But whatever may be the effect of such a declaration in the courts of that country, it cannot alter the essential nature of a corporation or prevent the courts of another jurisdiction from inquiring into its true character, whenever that may come in issue. It appears to have been the policy of the English law to attach certain consequences to incorporated bodies, which rendered it desirable that such associations as these should not become technically corporations. Among these, it would seem from the provisions of these acts, is the exemption from individual liability of the shareholder for the contracts of the corporation. Such local policy can have no place here in determining whether an association, whose powers are ascertained and its privileges conferred by law, is an incorporated body.

The question before us is whether an association, such as the one we are considering, in attempting to carry on its business in a manner which requires corporate powers under legislative sanction, can claim, in a jurisdiction foreign to the one which gave those powers, that it is only a partnership of individuals.

We have no hesitation in holding that, as the law of corporations is understood in this country, the association is a corporation, and that the law of Massachusetts, which only permits it to exercise its corporate function in that State on the condition of payment of a specific tax, is no violation of the Federal Constitution or of any treaty protected by said Constitution.

BRADLEY, J. Whilst I agree in the result which the court has reached, I differ from it on the question whether the company is a corporation. I think it is one of those special partnerships which are called joint-stock companies, well known in England for nearly a century, and cannot maintain an action or be sued as a corporation in this country without legislative aid. But as it is a company associated under the laws of a foreign country, it comes within the scope of the Massachusetts statute, and cannot claim exemption from its operation for the causes alleged in that behalf. It could not have been the intent of the treaty of 1815 to prevent the States from imposing taxes or license laws upon either British corporations or joint-stock companies desiring to establish banking or insurance business therein. And certainly these companies cannot be exempted from such laws on the ground that citizens of other States have chosen to take some of their shares.

Judgment affirmed.

THE PEOPLE *ex rel.* LOCKE W. WINCHESTER AS
TREASURER, ETC., RESPONDENT, *v.* MICHAEL
COLEMAN *et. al.*, ETC., APPELLANTS.

IN THE COURT OF APPEALS OF NEW YORK, MAY 24, 1892.

[Reported in 133 *New York Reports* 279.]

APPEAL from order of the General Term of the Supreme Court, in the first judicial department, made February 13, 1891, which affirmed a judgment in favor of plaintiff, entered upon a decision of the court on trial at Special Term, vacating an assessment.

This was a proceeding by *certiorari* to review the action of the commissioners of taxes and assessments of the city of New York,

in imposing an assessment upon the capital stock of the National Express Company, a joint-stock company, of which the relator is treasurer, for the year 1888.

The facts, so far as material, are stated in the opinion.

George S. Coleman for appellants.

James C. Carter for respondent.

FINCH, J. The relator was taxed upon its capital on the ground that it had become a corporation within the meaning of the provision of the Revised Statutes which enacts that "all moneyed or stock corporations deriving an income or profit from their capital or otherwise, shall be liable to taxation on their capital in the manner hereinafter prescribed." 1 R. S. title 4, c. 13, part 1. The company was formed as a joint-stock company or association in 1853 by a written agreement of eight individuals with each other, the whole force and effect of which, in constituting and creating the organization, rested upon the common-law rights of the individuals and their power to contract with each other. The relation they assumed was wholly the product of their mutual agreement and dependent in no respect upon the grant or authority of the State. It was entered into under no statutory license or permission, neither accepting nor designed to accept any franchise from the sovereign, but founded wholly upon the individual rights of the associates to join their capital and enterprise in a relation similar to that of a partnership. A few years earlier the legislature had explicitly recognized the existence and validity of such organizations, founded upon contract and evolved from the common-law rights of the citizens. Laws of 1849, c. 258. That act provided that any joint-stock company or association, which consisted of seven or more members, might sue or be sued in the name of its president or treasurer, and with the same force and effect, so far as the joint property and rights were concerned, as if the suit should be prosecuted in the names of the associates. But the act explicitly disclaimed any purpose of converting the joint-stock associations recognized as existing into corporations by a section prohibiting any such construction. § 5. In 1851 the act was amended in its form and application, but in no respect material to the present inquiry. There is no doubt, therefore, that when the company was formed and went into operation the law recognized a distinction and substantial difference between joint-stock companies and corporations and never confused one with the other, and that the existing statute which taxed the capital of corporations had no reference to or operation upon joint-stock companies or associations.

But two things have since occurred. The legislature, while

steadily preserving the distinction of names, has with equal persistence confused the things by obliterating substantial and characteristic marks of difference, until it is now claimed that the joint-stock associations have grown into and become corporations by force of the continued bestowal upon them of corporate attributes. It is said, and very probably correctly said, that the legislature may create a corporation, without explicitly declaring it to be such, by the bestowal of a corporate franchise or corporate attributes, and the cases of banking associations are referred to as instances of actual occurrence. *Thomas v. Dakin*, 22 Wend. 9; *Bank of Watertown v. Watertown*, 25 *id.* 686; *People v. Niagara*, 4 Hill, 20. It is added that such result may happen even without the legislative intent, and because the gift of corporate powers and attributes is tantamount to a corporate creation. It is then asserted that a series of statutes, beginning with the act of 1849, has ended in the gift to joint-stock associations of every essential attribute possessed by and characteristic of corporations (Laws of 1853, c. 153; Laws of 1854, c. 245; Laws of 1867, c. 289); that the lines of distinction between the two, however far apart in the beginning, have steadily converged until they have melted into each other and become identical; that every distinguishing mark and characteristic has been obliterated, and no reason remains why joint-stock associations should not be in all respects treated and regarded as corporations.

Some of this contention is true. The case of *People ex rel. Platt v. Wemple*, 117 N. Y. 136, shows very forcibly how almost the full measure of corporate attributes has, by legislative enactment, been bestowed upon joint-stock associations, until the difference, if there be one, is obscure, elusive, and difficult to see and describe. And yet the truth remains that all along the line of legislation the distinctive names have been retained as indicative and representative of a difference in the organizations themselves. As recently as the acts of 1880 and 1881, which formed the subject of consideration in the *Wemple* case, the legislature, dealing with the subject of taxation and desiring to tax business and franchises, imposed the liability upon "every corporation, joint-stock company or association whatever now or hereafter incorporated or organized under any law of this State." It is significant that the words "or organized" were inserted by amendment, and evidently for the understood reason that joint-stock companies could not properly be said to be "incorporated," but might be correctly described as "organized" under the laws of the State. This persistent distinction in the language of the statutes I should not be inclined to disregard or treat as of no practical

consequence, when seeking to arrive at the true intent and proper construction of the statute, even if I were unable to discover any practical or substantial difference between the two classes of organizations upon which it could rest, or out of which it grew, for the distinction so sedulously and persistently observed would strongly indicate the legislative intent, and so the correct construction.

But I think there was an original and inherent difference between the corporate and joint-stock companies known to our law which legislation has somewhat obscured, but has not destroyed, and that difference is the one pointed out by the learned counsel for the respondent, and which impresses me as logical and well supported by authority. It is that the creation of the corporation merges in the artificial body and drowns in it the individual rights and liabilities of the members, while the organization of a joint-stock company leaves the individual rights and liabilities unimpaired and in full force. The idea was expressed in *Supervisors of Niagara v. People*, 7 Hill, 512, and in *Gifford v. Livingston*, 2 Den. 380, by the statement that the corporators lost their individuality and merged their individual characters into one artificial existence; and upon these authorities a corporation is defined on behalf of the respondents to be "an artificial person created by the sovereign from natural persons and in which artificial person the natural persons of which it is composed become merged and non-existent." I am conscious that legal definitions invite and provoke criticism, because the instances are rare in which they prove to be perfectly accurate; and yet this one offered to us may be accepted if it successfully bears some sufficient test. In putting it on trial we may take the nature of the individual liability of the corporators on the one hand and of the associates on the other, for the debts contracted by their respective organizations, as a sufficient test of the difference between them, and contrast their nature and character.

It is an essential and inherent characteristic of a corporation that it alone is primarily liable for its debts, because it alone contracts them, except as that natural and necessary consequence of its creation is modified in the act of its creation by some explicit command of the statute which either imposes an express liability upon the corporators in the nature of a penalty, or affirmatively retains and preserves what would have been the common-law liability of the members from the destruction involved in the corporate creation. In other words, the individual liability of the members, as it would have existed at common law, is lost by their creation into a corporation, and exists thereafter only by force of the statute, upon some new and modifying conditions, to some

partial or changed extent, and so far preventing, by the intervention of an express command, the total destruction of individual liabilities which otherwise would flow from the inherent effect of the corporate creation. The penalties sometimes imposed are of course new statutory liabilities which never at common law rested upon the individual members. The retained liability occasionally established is in the nature and a parcel of such original liability, as we had occasion to show in *Rogers v. Decker*, 131 N. Y. 490, but is retained by force of the express command of the statute, and in that manner saved from the destruction which otherwise would follow the simple creation of the corporation. Ordinarily, these individual liabilities exist upon other than common-law conditions, and make the corporators rather sureties or guarantors of the corporation than original debtors, since in general their liability arises after the usual remedies against the corporation have been exhausted. But where that is not so, the invariable truth is that the creation of the corporation necessarily destroys the common-law liability of the individual members for its debts, and requires at the hands of the creating power an affirmative imposition of new personal liabilities or a specific retention of old ones from the destruction which would otherwise follow. Exactly the opposite is true of joint-stock companies. Their formation destroys no part or portion of their common-law liability for the debts contracted. Those debts are their debts, for which they must answer. Permission to sue their president or treasurer is only a convenient mode of enforcing that liability, but in no manner creates or saves it. The statute of 1853 did interfere with it. That act required in the first instance a suit against the president or treasurer, and so a preliminary exhaustion of the joint property. But that act was modal, and determined the procedure. It suspended the common-law right, but recognized its existence. We so held in *Witherhead v. Allen*, 4 Abb. Ct. App. Dec. 628, and at the same time said that the associations were not corporations, but mere partnership concerns. Even that mode of procedure has been modified by the Code, §§ 1922, 1923, so that the creditor at his option may sue the associates without bringing his action against the president or treasurer. These last and quite recent enactments show that the legislative intent is still to preserve and not destroy the original difference between the two classes of organizations; to maintain in full force the common-law liability of associates and not to substitute for it that of corporators; and preserving in continued operation that normal and distinctive difference, to evince a plain purpose not to merge the two organizations in one or destroy the boundaries which separate them. That intent, once

clearly ascertained, determines the construction to be adopted, and may be the only reliable test in view of the power of the State to clothe one organization with all the attributes of the other. The drift of legislation has been to lessen and obscure the original and characteristic difference. On the one hand corporations have been created with positive provisions retaining more or less the individual liability of the members, and on the other the joint-stock companies have been clothed with most of the corporate attributes, but enough of the original difference remains to show that our legislation not only carefully preserves the distinction of names, but sufficient, also, of the original difference of character and quality to disclose a clear intent not to merge the two.

We may thus see upon what the legislative intent to preserve them as separate and distinct is founded and what distinguishing characteristics remain. The formation of the one involves the merging and destruction of the common-law liability of the members for the debts, and requires the substitution of a new or retention of the old liability by an affirmative enactment which avoids the inherent effect of the corporate creation; in the other, the common-law liability remains unchanged and unimpaired, and needing no statutory intervention to preserve or restore it; the debt of the corporation is its debt and not that of its members, the debt of the joint-stock company is the debt of the associates, however enforced. The creation of the corporation merges and drowns the liability of its corporators, the creation of the stock company leaves unharmed and unchanged the liability of the associates; the one derives its existence from the contract of individuals, the other from the sovereignty of the State. The two are alike, but not the same. More or less, they crowd upon and overlap each other, but without losing their identity, and so, while we cannot say that the joint-stock company is a corporation, we can say, as we did say in *Van Aernam v. Bleistein*, 102 N. Y. 360, that a joint-stock company is a partnership with some of the powers of a corporation. Beyond that we do not think it is our duty to go.

The order should be affirmed, with costs.

All concur.

Order affirmed.

ANDREWS BROTHERS COMPANY *v.* YOUNGSTOWN
COKE COMPANY, LIMITED.IN THE UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH
CIRCUIT, APRIL 11, 1808.[*Reported in 86 Federal Reporter 585.*]

IN ERROR to the Circuit Court of the United States for the Eastern Division of the Northern District of Ohio.

This is an action by the Youngstown Coke Co., Limited, claiming to be a corporation organized under the law of Pennsylvania, against the Andrews Brothers Co., a corporation of the State of Ohio, to recover \$7967.95, with interest from January 31, 1889, for coke sold and delivered to the defendant by an unauthorized agent of the plaintiff, and used by the defendant corporation. The suit is to recover the market value as for a conversion. A jury was waived, and the issues of law and fact submitted to the court, which found for the plaintiff, and entered judgment for \$9519.16. This writ of error was sued out by the defendant for the purpose of reversing this judgment.

Thomas W. Sanderson for plaintiff in error.

John G. White for defendant in error.

Before TAFT and LURTON Circuit Judges, and CLARK, District Judge.

LURTON, J., after making the foregoing statement of facts, delivered the opinion of the court.¹

The first and principal question is whether the Circuit Court had jurisdiction. The plaintiff is described in its original petition as "a limited partnership association, duly organized and existing under and by virtue of the laws of the State of Pennsylvania, of which State it is a citizen." This was perhaps an insufficient statement of its corporate character, under *Chapman v. Barney*, 129 U. S. 677, 9 Sup. Ct. 426, and *Carnegie, Phipps & Co. v. Hulbert*, 3 C. C. A. 391, 53 Fed. 10. To meet this difficulty, an amended petition was filed, in which it was averred that the plaintiff was a corporation under the laws of Pennsylvania and a citizen of that State. The defendant in an amended answer, and by way of abatement, admits that the plaintiff company was created and organized under the Pennsylvania act of June 2, 1874, but denies that it thereby became either a corporation or a citizen of said State, within the meaning and effect of the statutes of the United States, requiring diversity of citizenship to

¹The opinion is not given in full.—Ed.

give jurisdiction to a United States court. A Pennsylvania act of March 21, 1836, provided for the creation of limited or special partnerships, having one or more general partners with unlimited liability and special partners with limited liability. But such associations had none of the attributes or faculties of a corporation. The history of that act and its amendments is fully stated in the opinion of the court in *Laflin & Rand Co. v. Steytler*, 146 Pa. St. 434, 23 Atl. 215. The act of 1874, under which the Youngstown Coke Company was organized, was neither an amendment nor a supplement to the act of 1836. In the case cited above, the court, in speaking of this act of 1874, says:

"The act of 1874, it will be seen, was not a mere amendment or supplement to anything that went before, but, like the act of 1836, a new scheme, carefully and elaborately drawn, creating a new kind of artificial person, standing between a limited partnership as previously known and a corporation, and partaking of the attributes of each. It was, however, a step forward in the same line of legislative recognition of business demands uniformly pursued since the start, in 1836."

The act of June 2, 1874, under which the defendant in error was organized, is in 17 sections. The first provides that three or more persons desiring to organize under the act may do so by preparing, signing, and acknowledging a statement in writing which shall set forth the amount of capital subscribed for by each; the total amount of capital, and when and how to be paid; the character of the business and location of same; the name of the association, with the word "Limited" added thereto as a part of same; the duration of the association, which shall not exceed 20 years; and the names of the officers selected in conformity with the act. The second section provides that the members of the association shall not be liable for the debts or engagements of the company beyond their unpaid subscriptions to the capital. The fourth section provides that interests in such associations shall be personal estates, and may be transferred, given, bequeathed, distributed, sold, or assigned under such rules and regulations as shall be adopted from time to time—

"By a vote of a majority of the members in number and value of their interests; and in the absence of such rules and regulations the transferee of any interest in any such association shall not be entitled to any participation in the subsequent business of such association, unless elected to membership therein, by a vote of a majority of the members in number and value of their interests. And any change of ownership, whether by sale, death, bankruptcy or otherwise, which occurs in the absence of any rules and regulations of such association regulating such transfer, and which

is not followed by election to membership in such associations, shall entitle the owner or transferee only to the value of the interest so acquired at the date of acquiring such interest, at a price and upon terms to be mutually agreed upon, and in default of such agreement, at a price and upon terms to be fixed by an appraiser to be appointed by the court of Common Pleas of the proper county, on the petition of either party, which appraisement shall be subject to the approval of said court."

The fifth section provides for a board of managers, who shall be not less than three nor more than five, one of whom shall be chairman, one the treasurer, and one the secretary. This section also provides that:

"No debt shall be contracted or liability incurred for such association, except by one or more of the managers, and no liability greater than five hundred dollars, except against the person incurring it, shall bind the association, unless reduced to writing and signed by at least two managers."

The sixth and seventh sections provide for distribution of profits through dividends, such dividends not to impair capital, and that it shall be unlawful to lend its credit, name, or capital to any member, or to any other person, without consent of a majority in number and value of members in writing. The eighth, ninth, and tenth sections provide how such companies may be dissolved, and how the property shall be distributed. The remaining parts of the act provide—First, that the association may sue and be sued in its associate name, service of process to be made upon one of its officers, or on any agent, clerk, or manager in counties where it may maintain an office; second, that such associations may acquire, hold, and convey real estate in its associated name.

This act does not declare these associations to be "corporations," nor are they styled "corporations." They are called "partnership associations." Neither does the act disclaim a purpose to create corporations, as was the case under the English and New York joint-stock acts mentioned and construed in *Liverpool Insurance Co. v. Massachusetts*, 10 Wall. 566, and *People v. Coleman*, 133 N. Y. 279, 31 N. E. 96. But the fact of corporation or no corporation must depend upon the existence or non-existence of those faculties which are of the essence of corporate existence. We need not be too attentive to mere names. The inquiry must go deeper, and a solution be reached upon principle.

In the masterly opinion of Chief Justice Nelson in *Thomas v. Dakin*, 22 Wend. 9, 70, that learned jurist, when engaged in the determination of a like question arising under the New York law providing for banking associations, was confronted with the fact

that the act did not declare the associations thereby organized to be corporations, or style them such, and said:

"A corporate body is known to the law by the powers and faculties bestowed upon it, expressly or impliedly, by the charter. The use of the term 'corporation' in its creation is of itself unimportant, except as it will imply them."

In the same case, Judge Cowen (22 Wend. 103) said:

"It has been impossible for me to see the force of the argument that the legislature have constantly avoided to call these associations, or any of their machinery, a corporation. Therefore we cannot adjudge them to be so. If they have the attributes of corporations, if they are so in the nature of things, we can no more refuse to regard them as such than we could refuse to acknowledge John or George to be natural persons, because the legislature may, in making provisions for their benefit, have been pleased to designate them as belonging to some other species. Should the legislature expressly declare each of them to be corporations, without giving them corporate succession or other artificial attributes, the declaration would not make them so. On the other hand, even an express legislative declaration that certain associations are not included in the definition of corporations would not change their character, provided they should in fact be clothed with all the essential powers of corporations."

* * * * *

Definitions are dangerous. They are most often too narrow, but not infrequently too broad. Many definitions of a corporation have been attempted. Most of them include one or more faculties which in this country are clearly not essential, or are included within more general powers already catalogued. Kyd defines a corporation thus:

"Though many things be incident to a corporation, yet, to form the complete idea of a corporation aggregate, it is sufficient to suppose it vested with the three following capacities: (1) To have perpetual succession under a special denomination, and under an artificial form; (2) to take and grant property, to contract obligations, and to sue and be sued by its corporate name in the same manner as an individual; (3) to receive grants of privileges and immunities, and to enjoy them in common. These alone are sufficient to the essence of a corporation."

Judge Nelson, in *Thomas v. Dakin*, cited above, says:

"We may, in short, conclude by saying, with the most approved authorities at this date, that the essence of a corporation consists in a capacity to have perpetual succession under a special name, and in an artificial form; (2) to take and grant property, contract obligations, sue and be sued by its corporate name as an

individual; and (3) to receive and enjoy, in common, grants of privileges and immunities."

Judge Dillon defines it thus:

"A corporation is a legal institution, devised to confer, upon the individuals of which it is composed, powers, privileges, and immunities which they would not otherwise possess, the most important of which are continuous legal identity and perpetual or indefinite succession, under the corporate name, notwithstanding successive changes, by death or otherwise, in the corporators or members of the corporation. It conveys, perhaps, as intelligible an idea as can be given by a brief definition to say that a corporation is a legal person, with a special name, and composed of such members, and endowed with such powers, and such only, as the law prescribes." 1 Dill. Mun. Corp. (3d Ed.) § 18.

Angel and Ames, in their work on Corporations, define a corporation as "a body created by law, composed of individuals united under a common name, the members of which succeed each other, so that the body continues the same, notwithstanding the change of the individuals who compose it, and is, for certain purposes, considered as a natural person." 1 Ang. & A. Corp. §§ 1-30.

It is not essential to the idea of a corporation that it shall have perpetual existence, for limited corporations are a matter of most common occurrence, whether organized under special or general laws. Neither is it essential that it shall have capacity to sue and be sued under its corporate name, for it may be authorized only to sue in the name of one of its officers, as was the case under the New York banking law. That it shall have capacity to sue and be sued under some name standing for the collective body is all that is necessary. *Thomas v. Dakin*, 22 Wend. 9; *Liverpool Insurance Co. v. Massachusetts*, 10 Wall. 566. In the last analysis, the only absolutely essential attribute of a corporation is the capacity to exist and act within the powers granted, as a legal entity, apart from the individual or individuals who constitute its members.

Thus, in Green's Brice, *Ultra Vires* (2d Am. Ed.), §§ 1, 2, it is said that "a corporation is a person which exists in contemplation of law only, and not physically." Again, the same author, in commenting on Kyd's definition, says:

"But sufficient stress is not laid upon that which is its real characteristic in the eye of the law—namely, its existence separate and distinct from the individual or individuals composing it. . . . This is the one important fact. The members of a corporation aggregate, and the one individual who is constituted a corporation sole, may, from their connection with such, have

rights and privileges, and be under obligations and duties, over and above those affecting them in their private capacity; but they get them by reflection, as it were, from the corporation. They individually are not the corporation—cannot exercise the corporate powers, enforce the corporate rights, or be responsible for the corporate acts.”

* * * * *

But these associations authorized by the Pennsylvania act of 1874 possess every attribute deemed essential to the existence of a corporation under any authoritative definition of a corporation. They come into being only by the creative power of the sovereign will, as expressed in the statute which authorizes their organization. That act constitutes at once the authority for their existence and the measure of their powers. When organized, they constitute a new artificial person, endowed with the power of suing and being sued, and of acquiring, holding, and conveying property in its artificial character. Created by compliance with the constating law, they can be dissolved only in the way pointed out by that law. Individual liability for corporate debts, beyond unpaid subscription to the capital stock, does not exist. *Coal Co. v. Rogers*, 108 Pa. St. 147-150; *Stevens v. Ball Club*, 142 Pa. St. 52-61, 21 Atl. 797. The members do not act as individuals, or as partners, but through and in the name of the collective or corporate body. *Hill v. Stetler*, 127 Pa. St. 145-162, 13 Atl. 306, and 17 Atl. 887. The members are not liable individually for the torts of the association, unless they personally participate. *Whitney v. Backus*, 149 Pa. St. 29, 24 Atl. 51. In all these respects it would be difficult to distinguish these companies from the ordinary business corporations authorized under general acts in most, if not all, of the States of the Union. In other respects they are somewhat peculiar, and it is these peculiar features which distinguish them from the ordinary business corporations provided for by other Pennsylvania legislation, and which have led to some confusion in defining their character. Thus, the managers alone may create a debt, and no liability in excess of \$500 is valid, unless the contract be in writing, and signed by two, at least, of the managers. This is a mere limitation upon the usual powers of officers and agents to bind the artificial body, and in no way affects the corporate character of that body. But the most marked peculiarity is found in the provisions of the fourth section of the constituting act, whereby, in the absence of some other regulation, adopted by the members, the assignee of the interest of a member in the capital stock, by operation of law or otherwise, does not become a member until elected. In default of election, the association must pay the value of the interest as ascertained by agreement, or, in

default thereof, by an appraiser, provided for in the statute. This *dilectus personarum* is a most inviting inducement to the formation of small business corporations, where the personnel of the members is a matter of some importance, and is the only feature which particularly distinguishes these associations from ordinary corporations. This power of selection is similar to that belonging to ordinary copartnerships. A member may sell his interest, but such sale dissolves the partnership. If the remaining members assent to the admission of the new member, the legal result is a new firm. Under this provision of the act of 1874, the sale of an interest does not operate as a dissolution, but requires that the company shall buy the interest unless the transferee is acceptable. The principle is not new in partnerships where the partners give a preference to the firm or its members by contract in event of sale or other devolution of title.

* * * * * *

We have already seen by the Pennsylvania cases cited that that court had time and again held these companies to have the very attributes which enable us to distinguish a corporation from a mere partnership. The fact that these companies were not called "corporations" in the act of 1874, and that they possessed this *dilectus personarum*, has led to some confusion of terminology in the effort to describe them. In *Coal Co. v. Rogers*, 108 Pa. St. 147-150, where the question was as to whether such company was included within a penal act touching trespasses by any person or corporation, the court said:

"Such an association is not technically a corporation, yet it has many of the characteristics of one. It can sue and be sued in its associate name only. The longest period of its duration is fixed by the act which provides for its existence. Like most corporations, its capital (except in certain cases designated by the act) is alone liable for its debts. The making of any division of profits which shall at the time diminish or impair the capital of the association is prohibited. . . . The act further provides for a dissolution of the association, for winding up its business, and for the distribution of its property. It may not be improper to call such an association a 'quasi corporation.' If not a corporation, it is a person. It is either a natural or an artificial person. There is no intermediate place for it to occupy, no other name for it to bear. It cannot claim an existence which exempts it from all liabilities imposed on either class of persons. In law, the main division of persons is between natural and artificial persons. The latter class are corporations."

* * * * * *

But does the existence of the *dilectus personarum* take from

the body possessing it the character of a corporation, if it possesses those attributes which, by general consent, distinguish a corporation from a mere voluntary association? The general and well-settled rule is that, in the absence of statutory authority, a corporation may not make the transfer of shares dependent upon the discretion of the corporation, its officers or agents. They may by reasonable rule regulate such transfer, but they cannot prohibit. Mor. Priv. Corp. §§ 164, 165. But that this power may be conferred by the charter is equally well settled. *Id.*, and authorities cited; Lowell, Stocks, § 31. This privilege of the *dilectus personarum*, while unusual in corporations for profit, is a very common provision in the charters of companies not for profits, such as clubs, boards of trade, fraternal societies, educational and charitable associations. Joint-stock companies have no invariable character. Sometimes they are incorporated, and sometimes they are not. The test is the attributes conferred by the statute under which they are organized. Mor. Priv. Corp. § 6. Certain express companies, widely known in this country as joint-stock companies, have been held not to be corporations, within the meaning of local taxing laws.

The case of *People v. Coleman*, 133 N. Y. 279, 31 N. E. 96, is interesting as showing the history and legislative origin of certain of these companies. The case only involved the question as to whether there was a legislative or practical distinction between joint-stock associations and corporations organized under the law of New York, and whether the capital of a joint-stock company was taxable under a New York statute taxing the capital stock of corporations. The court refers to *People v. Wemple*, 117 N. Y. 136, 22 N. E. 1046, and says that case "shows very forcibly how almost the full measure of corporate attributes has, by legislative enactment, been bestowed upon joint-stock associations until the difference, *if there be one, is obscure, elusive, and difficult to see and describe.*" (The italics are ours.)

* * * * *

If the non-liability of the members for the collection of debts be in fact a test of a corporation, then these Pennsylvania companies are clearly corporations under this authority. But we cannot be supposed to concede this. In *Liverpool Insurance Co. v. Massachusetts*, 10 Wall. 566-575, the fact of the liability for company debts of the members of the Liverpool Insurance Co. was held to be no sufficient test of the corporate character of that joint-stock association. Justice Miller, as to this, said:

"To this view it is objected that the association is nothing but a partnership, because its members are liable individually for the debts of the company. But, however the law on this subject may

be in England, it is quite certain that the principle of personal liability of the shareholders attaches to a very large proportion of the corporations of this country, and it is a principle which has warm advocates for its universal application when the organization is for pecuniary gain."

* * * * *

Our conclusion, therefore, is that the Youngstown Coke Co. is a corporation and a citizen of Pennsylvania, within the meaning of the jurisdictional requirement in respect to diversity of citizenship.

* * * * *

There being no error, the judgment must be affirmed.

SECTION III.—THE CORPORATION AS DISTINGUISHED FROM THE STOCKHOLDER.

THE QUEEN *v.* ELIAS ARNAUD *et al.*

IN THE QUEEN'S BENCH, DECEMBER 3, 1846.

[Reported in 16 *Law Journal*, *Queen's Bench*, *New Series*, 50.]

MANDAMUS. The writ recited letters patent of the 17th of February, 1840, by which Her Majesty constituted G. B. A. G., etc., together with such other persons as should become subscribers toward the capital or joint stock therein mentioned, and such other persons as should from time to time become proprietors of any part of such capital or joint stock, one body politic and corporate for the period of twenty-one years, by the name of the Pacific Steam Navigation Co., and that by that name they should sue and be sued, etc.; and that the said corporation should be established for the purpose of providing vessels to be impelled by steam, etc., and of employing the same, and sailing vessels if need should be, within the limits therein mentioned, which were declared to be, along the shores of North and South America in the Pacific Ocean, and likewise from or between those shores and the coasts of China and New Holland, etc., and also from or between the ports of New Grenada, Central America, and Mexico, in the Atlantic Ocean, and those of the West Indies (in certain events). The letters patent then directed that the capital of the corporation should be £250,000, in 5000 shares of £50 each, and that every person subscribing £50, etc., should have and be entitled to a share of and in the said capital or joint stock of the said corporation, and to a proportional share of the profits and advantages at-

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tending the capital stock of the said corporation, and should be admitted a proprietor of and in the same; that it should be lawful for the several proprietors to sell and to transfer any share of the capital stock (in the manner and under the restrictions particularly set forth); and that such transfer, executed as aforesaid, should effect the transfer of such stock, and should convey the whole estate and interest of the proprietor transferring to the person accepting the same. The letters patent then authorized the corporation, for twenty-one years from the date of the letters patent, out of the funds and property of the said corporation, to build, or to purchase and provide such vessels, etc., as might appear to them necessary for the purposes of the corporation: provided always, that it should not be lawful for the said corporation to employ such vessels for the conveyance of passengers, etc., except within the limits aforesaid. The corporation were further authorized to purchase, take, hold and enjoy, to them and their successors, such wharfs, docks, houses, offices, and buildings, etc., and such ships and vessels as should from time to time be actually and *bona fide* necessary and proper for the purpose of managing, conducting, and carrying on the affairs and business of the said corporation. The writ then recited that the said G. B. A. G. and others had become subscribers, and that certain other persons had become proprietors of part of the capital of the corporation, in the manner in the letters patent provided; and that afterward, and while the said Pacific Steam Navigation Co. was a corporate body in the United Kingdom of Great Britain and Ireland, under and by virtue of the letters patent, the said corporation did, in pursuance of the provisions therein contained, purchase and provide, out of the funds and property of the said corporation, a certain steamship or vessel which was wholly of the build of the said United Kingdom, called the *Ecuador*, and which then appeared to them to be, and which, in fact, was necessary for the purposes of the said corporation, and which said ship was so purchased for the purpose of being employed by the said corporation for the said purposes within the limits in the letters patent mentioned, and not otherwise; that before any such employment of the ship, the corporation were desirous that the same should be duly registered under and by virtue of the statutes, etc.; that at the time of the after-mentioned application to the defendants, the principal office and place of business of the said corporation was, and still is, established at the port of Liverpool; that the said port was the port to which the ship belonged; that the ship, before and at the time of such application, wholly belonged to, and still continued wholly to belong to the said corporation; that before the application for the registering, etc., such examination and measure-

See Cal. 309.

ment of the ship as is required by the stat. 8 & 9 Vict. c. 89 had been duly made, and a true and just account in writing of all such particulars as are specified in the form of certificate in the said statute mentioned, and signed as therein mentioned, had been duly delivered to the defendants, on behalf of the said corporation; that William Taggart, of Liverpool, then being secretary of the said corporation, on the 27th of January, 1846, applied to and requested the defendants, at the said port of Liverpool, to register, or concur in the registration, at the said port, of the said ship, the *Ecuador*, under and according to the provisions of the said act of Parliament, upon the said W. Taggart then taking and subscribing, as such secretary, the declaration prescribed by the said act of Parliament in cases where it shall become necessary to register any ship or vessel belonging to any corporate body in the United Kingdom; and that the said W. Taggart, as such secretary, was then ready and willing to take and subscribe such declaration, but that the defendants then and there refused to register or concur in the registration of the said ship under the provisions of the said act, upon such declaration being taken and subscribed by the secretary of the said corporation. The writ then, on the complaint of the corporation, commanded the defendants, Arnaud, the collector, and Powell, the Comptroller of Customs for the port of Liverpool, to register or concur in the registration of the said ship, the *Ecuador*, according to the provisions of the said act of Parliament, or to show cause, etc.

Return. That before and at the time of the application to the defendants for the registration of the said ship, the said ship did not wholly belong to Her Majesty's subjects, duly entitled to be owners of ships registered by virtue of the said act of Parliament, etc.; and that divers, to wit, ten persons, whose names were to the defendants unknown, the said persons being foreigners, and before then having taken the oath of allegiance to a certain foreign state, to wit, the state of Mexico, not under the terms of any capitulation, and not being afterward denizens or naturalized subjects of the United Kingdom by Her Majesty's letters patent, or by act of Parliament, and divers, to wit, ten other persons, whose names were to the defendants unknown, the said last-mentioned persons then being persons usually residing in a certain country not under the dominion of Her Majesty, to wit, in Mexico, and not then being members of any British factory, or agents for, or partners in any house or copartnership, actually carrying on trade in Great Britain or Ireland, before and at the time of the application to the defendants for the registration of the ship, were part owners of and interested in and had part interest in the ship, and were entitled to share the profits and advantages attending

the employment of the same. The defendants therefore submitted and returned, "and therefore we cannot register or concur in the registration of the said steamship," etc.

Plea to the return. That the said ship did before and at the time of the application to the defendants for the registration thereof, wholly belong to a subject of Her Majesty, duly entitled to be the owner of ships registered by virtue of the said act, to wit, the said Pacific Steam Navigation Co., so then being such corporate body in the United Kingdom of Great Britain and Ireland. And that the persons in the return mentioned were not before or at the time of the application to the defendants part owners, nor was any or either of them then a part owner of or interested in, nor had they or any or either of them part interest in the said ship, otherwise than as being members and proprietors of the said corporation, to wit, by the subscription for or the purchase of shares in the capital or joint stock thereof, in pursuance of the provisions in the said letters patent contained.

Verification.

Demurrer and joinder.

The prosecutor's points for argument were, that the return was insufficient, on the ground, that it admitted the allegations in the writ, that the Pacific Steam Navigation Co., at the time of the application for the registration of the ship, was and still is a corporate body in the United Kingdom, and that the ship wholly belonged to the said corporation, and was purchased and held by them for the purposes mentioned in the letters patent; that the matter set forth in the return was therefore insufficient to prevent the prosecutors from claiming the benefit of the registration, upon such declaration being taken and subscribed by their secretary, as prescribed by the stat. 8 & 9 Vict. c. 89, in cases of registering ships belonging to corporations; and also that the said corporation is a subject of Her Majesty, duly entitled to own ships and vessels within the meaning of the said act.

The defendants' points were, that the Pacific Steam Navigation Co. was not a subject of Her Majesty entitled to own ships or vessels within the meaning of the Registration Act, and that the interest of certain foreigners, holding shares in the capital or joint stock of the company, was such as to disqualify the *Ecuador* from registration as a British ship.

Sir F. Thesiger for the defendants.

M. D. Hill, Phipson with him, *contra*.

The judgment of the court was delivered by—

LORD DENMAN, C. J. The object of the present mandamus is to compel the custom-house officers to register a vessel, the property of the Pacific Steam Navigation Co. The company is a cor-

poration by charter of her present Majesty, for the purpose of providing vessels, and employing them in the Pacific Ocean. It is admitted by the defendants that the company, as a British corporation, might be owners of British-built vessels, and *prima facie* would be, as such corporation, entitled to register them, under the provisions of the 8 & 9 Vict. c. 89, applicable to the registry of vessels by corporations. But it is said that some of the members of the corporation are not British subjects, but foreigners; and, consequently, that the vessel does not wholly belong to Her Majesty's subjects, as required by the 5th section of the act, and is within the prohibition contained in the 12th section of the act, against foreigners being entitled to be owners, in whole or in part, directly or indirectly, of any vessel requiring to be registered. Now, it appears to us that the British corporation is, as such, the sole owner of the ship, and a British subject within the meaning of the 5th section, as far as such a term can be applicable to a corporation, notwithstanding some foreigners may individually have shares in the company, and that such individual members of the corporation are not entitled, in whole or in part, directly or indirectly, to be owners of the vessel. The individual members of the corporation, no doubt, are interested in one sense in the property of the corporation, as they may derive individual benefit from its increase, or loss from its destruction; but in no legal sense are the individual members the owners. If all the individuals of the corporation were duly qualified British subjects, they could not register the vessel in their individual names as owners; but must register it as belonging wholly to the corporation as owner. The terms of the 23d section, with respect to the condition of the bond to be given upon obtaining the registry, as to foreigners purchasing or becoming entitled to any part or share of or interest in any ship or vessel, would appear to be applicable to a case of purchase or transfer of property in the vessel itself, as it provides that the certificate shall be delivered up, "within seven days after such purchase or transfer of property in such ship," and does not, as it seems to us, bear materially on the present question. It was contended, that the effect might be to defeat the object and policy of the navigation laws in this respect, inasmuch as the individual members of the British corporation might, either originally or by transfer, be all foreigners. Such does not appear to be contemplated or provided for by the act in question. If it be *casus omissus*, and evil consequences arise, they may be remedied by the interference of the legislature, or, possibly (though we do not wish to be understood as giving any opinion upon this point), by repealing the letters patent, as improvidently giving powers operating to defeat the law and public

policy, and, in future patents, by providing against the objection. But, as the case stands, it seems to us that the British corporation is, to all intents, the legal owner of the vessel, and entitled to the registry, and that we cannot notice any disqualification of an individual member, which might disable him, if owner, from registering the vessel in his own name. There will, therefore, be judgment for the prosecutors, and a peremptory mandamus.

Judgment for the Crown.

BUTTON v. HOFFMAN.

IN THE SUPREME COURT OF WISCONSIN, SEPTEMBER 24, 1884.

[Reported in 61 Wisconsin Reports 20.]

APPEAL from the Circuit Court for Jackson County.

Replevin. The facts sufficiently appear from the opinion. The defendant appealed from a judgment in favor of the plaintiff.

C. F. Ainsworth and *S. U. Pinney* for the appellant.

Carl C. Pope for the respondent.

ORTON, J. This is an action of replevin in which the title of the plaintiff to the property was put in issue by the answer.

In his instructions to the jury the learned judge of the Circuit Court said: "I think the testimony is that the plaintiff had the title to the property." The evidence of the plaintiff's title was that the property belonged to a corporation known as "The Hayden & Smith Manufacturing Co.," and that he purchased and became the sole owner of all of the capital stock of said corporation. As the plaintiff in his testimony expressed it, "I bought all the stock. I own all the stock now. I became the absolute owner of the mill. It belonged at that time to the company, and I am the company." There was no other evidence of the condition of the corporation at the time. Is this sufficient evidence of the plaintiff's title? We think not. The learned counsel of the respondent in his brief says: "The property had formerly belonged to the Hayden & Smith Manufacturing Co., but the respondent had purchased and become the owner of all the stock of the company, and thus became its sole owner."

From the very nature of a private business corporation, or, indeed, of any corporation, the stockholders are not the private and joint owners of its property. The corporation is the real, though artificial, person substituted for the natural persons who procured its creation and have pecuniary interests in it, in which all its property is vested, and by which it is controlled, managed, and

disposed of. It must purchase, hold, grant, sell, and convey the corporate property, and do business, sue and be sued, plead and be impleaded, for corporate purposes, by its corporate name. The corporation must do its business in a certain way, and by its regularly appointed officers and agents, whose acts are those of the corporation only as they are within the powers and purposes of the corporation. In an ordinary copartnership the members of it act as natural persons and as agents for each other, and with unlimited liability. But not so with a corporation; its members, as natural persons, are merged in the corporate identity. Ang. & A. on Corp. secs. 40, 46, 100, 591, 595. A share of the capital stock of a corporation is defined to be a right to partake, according to the amount subscribed, of the surplus profits obtained from the use and disposal of the capital stock of the company to those purposes for which the company is constituted. *Id.* sec. 557. The corporation is the trustee for the management of the property, and the stockholders are the mere *cestui que trusts*. Gray v. Portland Bank, 3 Mass. 365; Eidman v. Bowman, 4 Am. Corp. Cas. 350. The right of alienation or assignment of the property is in the corporation alone, and this right is not affected by making the stockholders individually liable for the corporate debts. Ang. & A. on Corp. sec. 191; Pope v. Brandon, 2 Stewart (Ala.), 401; Whitwell v. Warner, 20 Vt. 444. The property of the corporation is the mere instrument whereby the stock is made to produce the profits, which are the dividends to be declared from time to time by corporate authority for the benefit of the stockholders, while the property itself, which produces them, continues to belong to the corporation. Bradley v. Holdsworth, 3 Mees. & W. 422; Waltham Bank v. Waltham, 10 Met. 334; Tippetts v. Walker, 4 Mass. 595. The corporation holds its property only for the purposes for which it was permitted to acquire it, and even the corporation cannot divert it from such use, and a shareholder has no legal right to it, or the profits arising therefrom, until a lawful division is made by the directors or other proper officers of the corporation, or by judicial determination. Ang. & A. on Corp. secs. 160, 190, 557; Hyatt v. Allen, 4 Am. Corp. Cas. 624. A conveyance of all the capital stock to a purchaser gives to such purchaser only an equitable interest in the property to carry on business under the act of incorporation and in the corporate name, and the corporation is still the legal owner of the same. Wilde v. Jenkins, 4 Paige, 481. A legal distribution of the property after a dissolution of the corporation and settlement of its affairs, is the inception of any title of a stockholder to it, although he be the sole stockholder. Ang. & A. on Corp. sec. 779a.

These general principles sufficiently establish the doctrine that

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reference
required.

the owner of all the capital stock of a corporation does not therefore own its property, or any of it, and does not himself become the corporation, as a natural person, to own its property and do its business in his own name. While the corporation exists he is a mere stockholder of it, and nothing else. The consequences of a violation of these principles would be that the stockholders would be the private and joint owners of the corporate property, and they could assume the powers of the corporation, and supersede its functions in its use and disposition for their own benefit without personal liability, and thus destroy the corporation, terminate its business, and defraud its creditors. The stockholders would be the owners of the property, and, at the same time, it would belong to the corporation. One stockholder owning the whole capital stock could, of course, do what several stockholders could lawfully do. It is said in *Utica v. Churchill*, 33 N. Y. 161, "the interest of a stockholder is of a *collateral* nature, and is not the interest of an *owner*;" and in *Hyatt v. Allen*, *supra*, that "a shareholder in a corporation has no legal title to its property or profits until a division is made." In *Winona & St. P. R. R. Co. v. St. P. & S. C. R. R. Co.* 23 Minn. 359, it is held that the corporation is still the absolute owner, and vested with the legal title of the property, and the real party in interest, although another party has become the owner of the sole beneficial interest in its rights, property, and immunities. In *Baldwin v. Canfield*, 26 Minn. 43, it was held that the sole owner of the stock did not own the land of the corporation so as to convey the same. In *Bartlett v. Brickett*, 14 Allen, 62, an action of replevin was brought by A., B., and C., as the "Trustees of the Ministerial Fund in the North Parish in Haverhill," which was the corporate name. In portions of the writ the plaintiffs were referred to as "the said trustees" and "the said plaintiffs." In the bond, "A., B., and C., trustees as aforesaid," became bound, and the officer, in his return, certified that he had taken a bond "from the within-named A., B., and C.," and the property was receipted by "A., B., and C., plaintiffs." It was held that the action was not by the corporation, as it should have been, and judgment was rendered for the defendant. It is said in *Van Allen v. Assessors*, 3 Wall. 584, "the corporation is the legal owner of all the property of the bank, both real and personal." In *Wilde v. Jenkins*, *supra*, where a copartnership bought all the property and effects, together with the franchises, of a corporation, and elected themselves trustees of the corporation, it was held that the corporation was not dissolved, and that the legal title to the real and personal property was still in the corporation for their benefit. In *Mickles v. R. C. Bank*, 11 Paige, 118, it was held that, although a corporation was

deemed to have surrendered its charter for non-user, it was not dissolved, and would not be until its dissolution was judicially declared, and that until then its property could be taken and sold by its judgment creditors. In *Bennett v. Am. Art Union*, 5 Sandf. Super. Ct. 614, it was held that, "as a general rule, the whole title, legal and equitable [to its property], is vested in the corporation itself," and that the individual members have no other or greater interest in it than is expressly given to them by the charter, and the prayer of the complainant, as a shareholder in the Art Union, for an injunction against a certain disposition of its property, was denied, because he had no interest in it. See, also, *Goodwin v. Hardy*, 57 Me. 143.

It is true that none of the above cases are precisely parallel with the present case in facts, but they are sufficiently analogous to be authority upon the principle that the plaintiff, as the sole stockholder of the corporation, is not the legal owner of its property. He may have an equitable interest in it, but in this action he must show a legal title to the property in himself in order to recover, and he has shown that such title is in another person. *Timp v. Dockham*, 32 Wis. 146; *Sensenbrenner v. Mathews*, 48 Wis. 250. In analogy to the above principle it was held in *Murphy v. Hanrahan*, 50 Wis. 485, that the sole heirs of an estate did not have such a legal title to a promissory note given to their father as would entitle them to sue the maker upon it, because the title to it was in the administrator, and they could obtain the title only by administration and distribution according to law. The heirs in that case certainly had as much equitable interest in that note as this plaintiff has in the property in controversy. The want of title to the property being fatal to the plaintiff's recovery in the action between the present parties, other alleged errors will not be considered.

By the court. The judgment of the Circuit Court is reversed, and the cause remanded for a new trial.

MATTHEW GALLAGHER v. GERMANIA BREWING CO.

IN THE SUPREME COURT OF MINNESOTA, MAY 9, 1893.

[Reported in 53 Minnesota Reports 214.]

APPEAL by plaintiff, Matthew Gallagher, from an order of the District Court of Hennepin County, Charles M. Pond, J., made April 6, 1892, overruling his demurrer to the complaint of the interveners.

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Herman A. Westphal in February, 1890, filled the ice house of defendant, Germania Brewing Co., at Keegan's Lake, with ice, for which it agreed to pay him \$965. He also sold and delivered to it in July, 1890, 37,000 pounds of ice for \$37. The corporation paid Westphal thereon \$163.74. Westphal afterward, and before March 1, 1892, made a general assignment of all his non-exempt property to the plaintiff, in trust to pay his creditors. On the last-mentioned day the assignee commenced this action against the defendant, Germania Brewing Co., to recover the balance of \$838.26. The defendant answered that it had paid the claim in full, and also that it held demands against Westphal which it would set off on the trial.

On March 21, 1892, Jacob Barge and John Vander Horck intervened in the action and filed their complaint in intervention, stating that the Germania Brewing Co. was organized as a corporation in 1887, and acquired real and personal property. That on July 21, 1890, it sold and conveyed all its property, business and good-will to the Minneapolis Brewing & Malting Co., another corporation, and ceased to carry on business, and has since existed only to wind up its affairs. That Barge owns one-half and Vander Horck the other half of the stock of the Germania Brewing Co. That Vander Horck recovered judgment September 19, 1891, against Westphal for \$1178.94, and that Barge recovered judgment March 10, 1892, against Westphal for \$2267.73. That both judgments remain wholly unpaid and in force, but unsecured by lien or levy or otherwise. That Westphal has been insolvent since January 27, 1890, and wholly without property or means, and that the estate assigned to the plaintiff will not pay a dividend of one per cent. upon Westphal's debts. The interveners prayed that one-half of the Westphal claim against the Germania Brewing Co. be applied upon each of their judgments, and for such other relief as should seem equitable.

The plaintiff demurred to this complaint in intervention, on the ground that it stated no facts entitling the interveners to the relief demanded, or to any relief in the action. The trial court overruled the demurrer, and allowed plaintiff ten days to answer. He appeals from the order.

Freeman P. Lane and *Wm. H. Briggs* for appellant.

Gretchen & McHugh for respondents.

MITCHELL, J. The plaintiff, as assignee of one Westphal under a general assignment for the benefit of creditors, brought this action to recover for goods sold and delivered by his assignor to the defendant corporation. Jacob Barge and John Vander Horck intervened, and set up in their complaint that they owned, and for nearly two years had owned (each one-half), all the capital

stock of the defendant, no other person but themselves having any interest in the stock or property of the corporation; that each of them had a valid and unsatisfied judgment against Westphal upon a cause of action which accrued before the assignment to plaintiff; that Westphal was, and for over two years had been, utterly insolvent; and that his estate, of which plaintiff is the assignee, was so hopelessly insolvent that it was insufficient to pay even the expenses of administering the assignment. The relief sought was that their claims against Westphal might be allowed, in equal amounts, as equitable set-offs to the claim of the plaintiff against the defendant corporation. From an order overruling a demurrer to the complaint, the plaintiff appeals, his contention being—First, that Barge and Vander Horck had no such interest in the litigation as to entitle them to intervene; second, that their claims cannot be set off against a claim against the corporation, because a corporation is a legal entity, entirely distinct from its stockholders. These two propositions amount really to the same thing, for, if Barge and Vander Horck cannot set off their claims against that of plaintiff against the corporation, they have no such interest in the subject of litigation as would entitle them to intervene; on the other hand, if their claims are proper equitable set-offs, their right to intervene for the purpose of setting them up is very clear. The case is certainly a novel one, for we doubt whether an instance can be found in the books where stockholders ever attempted to set up their several equities by way of set-off to claims against the corporation. Of course, the want of a precedent is by no means controlling with courts, especially in administering equitable relief; but it would seem that, if the relief here asked was consistent with legal or equitable principles, some case would be found where it had been granted.

The facts of the present case appeal to a natural sense of justice, for while, by fiction of law, a corporation is a distinct entity, yet in reality it is an association of persons who are in fact the beneficial owners of all the corporate property. Hence, if interveners cannot set off their claims, the practical result is that Westphal's estate will collect its entire claim out of what is really their property, while the estate is at the same time indebted to them on claims of greater amount, which they will wholly lose because of Westphal's insolvency; but, as has been often said, hard cases are liable to make bad law.

The right of equitable set-off is, of course, not derived from, or dependent upon, statute, but rests upon a distinctly equitable doctrine, which courts of equity have applied on certain well-recognized equitable grounds, the object being to effect a clear equity and prevent irremediable injustice; and it may be stated as a gen-

eral rule that, whenever necessary to accomplish that end, the courts will permit an equitable set-off, although the debts accrued in different rights; as, for example, by allowing a separate debt to be set off against a joint debt, or, conversely, a joint debt against a separate debt. They will also disregard the nominal parties to the record, and consider the real parties in interest; as, for example, when the assignor of a chose in action sues for the benefit of the assignee, or a trustee for the benefit of the *cestui que trust*. Hence, had the plaintiff's claim been a joint one against the interveners, there would have been no doubt of their right to set off their separate claims against it, for insolvency is well recognized as a distinct equitable ground for allowing such a set-off. But such a case is not analogous to the present. To allow the set-off here, it is necessary to wholly ignore the legal doctrine, or fiction, whichever you may call it, that a corporation is an entity separate and distinct from the body of its stockholders, and to treat it as a mere association of individuals who are the real parties in interest. In dealing with the rights of creditors, and the obligations existing between a corporation and its shareholders by reason of their contract of membership, undoubtedly the courts often find it necessary to consider the real parties in interest as the individual shareholders; but it may be laid down as a rule that, except in such cases, it has been found absolutely essential, for the administration of justice, to treat a corporation as a collective entity, without regard to its individual shareholders. In no other way can the title to corporate property be kept free from complication and uncertainty. The transferable nature of stock in a corporation is also a good reason why the theory of a corporate entity should be preserved, and why it is necessary to discriminate sharply between corporate rights and obligations and those of shareholders personally. If the rights or liabilities of a corporation could be affected by the acts of the stockholders, except when acting in the corporate name, or if shareholders could set up their several equities against persons having claims against the corporation, or, conversely, if claims in favor of the corporation could be set off against claims against individual stockholders, it can easily be seen into what confusion and chaos corporate affairs would inevitably fall.

Inasmuch as the two interveners own all the stock of this corporation, the facts of this case seem comparatively free from embarrassments, and the contention of respondent quite plausible. But, suppose there were fifty other stockholders (which would not alter the principle), what would be the result? Could interveners then interpose their claims as set-offs, and, if so, could they do so to the full amount of their claims, or only in the proportion

which their shares bore to the whole capital stock? And, if the former, would they have a claim for the excess against the corporation, or a right to call on the other stockholders for contribution?

Again, the right of set-off, if any exist, must be mutual. Hence, if stockholders can interpose their individual demands as set-offs to a demand against the corporation, it follows that a defendant can set up demands against the individual stockholders as set-offs to demands in favor of the corporation.

Illustrations might be multiplied indefinitely to show that to recognize any such right would result in the worst sort of complications, and that the only safe or sound rule is to adhere strictly, in such cases, to the doctrine of a corporate entity distinct from the individual stockholders.

What means, if any, the interveners might have had, or may hereafter have, of protecting themselves, it is not now our business to inquire, but we are clear that their claims against plaintiff's assignor are not the subjects of equitable set-off to a claim against the defendant corporation.

Order reversed.

VANDEBURGH, J., absent, took no part.

JOHN FOSTER & SONS, LIMITED, v. THE COMMISSIONERS OF INLAND REVENUE.

.....IN THE COURT OF APPEAL, DECEMBER II, 1893.

[*Reported in Law Reports, 1 Queen's Bench (1894) 516.*]

IN 1891, eight persons, named Foster, respectively agreed to convert into a limited company the partnership in which they had for many years carried on business as merchants and manufacturers and land and colliery proprietors at Queensbury, in the county of York. On October 30 in that year they subscribed a memorandum and articles of association of the intended company, whereby the objects of the company were stated to be (*inter alia*) "to acquire and take over as a going concern, and carry on, the undertaking and business as spinners and manufacturers, merchants and bankers, heretofore carried on at Queensbury and Bradford, in the county of York, and elsewhere, under the style of John Foster & Son, and the mills, factories, warehouses and other buildings, works, houses, lands, mines, minerals, and all or any other of the assets and liabilities of the proprietors of that undertaking and business in connection therewith."

With respect to capital the memorandum of association provided as follows:

"The capital of the company is £360,000 divided into 21,000 preference shares of £10 each, and 15,000 ordinary shares of £10 each; the said preference shares shall carry a fixed non-cumulative preferential dividend at the rate of £5 per centum per annum on the capital paid up thereon, and shall rank as regards capital in priority to the other shares, and the company shall have power to issue any further shares created upon any increase of capital, with any preferential, deferred or special rights, privileges or conditions attached thereto, but the preferential rights hereby assigned to the said 21,000 preference shares shall not be infringed."

The 3d article of association provided as follows: "The company is to be entitled, as from the 1st day of January, 1891, to the business heretofore carried on by the founders at Queensbury and elsewhere under the firm or name of John Foster & Son, and all the assets of such business including the fee simple of the freeholds in the occupation of the founders as joint tenants or tenants in common; and the company *in exchange and substitution therefor* is to issue to the founders 15,000 fully paid-up ordinary shares and 21,000 fully paid-up preference shares in the capital of the company, and £240,000 in debenture stock of the company as follows:

Name.	Ordinary Shares.	Preference Shares.	Debenture Stock.
Abraham Briggs Foster.....	2,250	3,150	£36,000
John Foster	2,250	3,150	36,000
William Henry Foster.....	2,500	3,500	40,000
Robert John Foster.....	2,500	3,500	40,000
Frederic Charles Foster.....	2,500	3,500	40,000
Herbert Anderton Foster.....	2,500	3,500	40,000
Philip Staveley Foster.....	250	350	4,000
John Kenneth Foster.....	250	350	4,000
	15,000	21,000	£240,000

"And the company is to undertake all the debts and liabilities of the founders in connection with the said business. Before any of the said shares are issued a proper contract in writing is to be filed with the registrar of joint-stock companies."

The whole of the capital and debenture stock was thus apportioned among the partners, in exact proportion to their respective agreed shares in the partnership; but by the memorandum and by the 46th and following articles, provision was made for

the creation and issue of new shares either to the original shareholders or the public.

The company was incorporated on November 11. On November 27 a deed, made between the eight Messrs. Foster of the first eight parts, and John Foster & Sons, Limited, of the ninth part, was duly executed. This deed recited (*inter alia*) that the eight partners were desirous that their firm should be reconstructed as a limited company, and had agreed and resolved that the whole of the undertaking, property, and liabilities of the firm should be transferred to a company, to be formed of all the partners in the firm exclusively for the purpose of taking over the same (being the company party thereto), and that there should be allotted among the partners, in proportion to their shares in the partnership, the whole of the shares in the company, which were of the nominal value of £150,000 in ordinary, and £210,000 in preference shares, and all the debentures or debenture stock of the company, which was of the nominal value of £240,000. The deed then recited that for the purpose of carrying the said desire into effect a limited company had recently been formed and registered under the title of "John Foster & Sons, Limited" (being the company party thereto), having a capital of £360,000 in preference and ordinary shares, "all of which, as also £240,000 debenture stock, which comprises the total capital or property of the said company, are taken and held by the said partners parties hereto of the first eight parts in the following shares and proportions, it being their intention to continue to carry on business and retain and manage the property of the said firm under the powers of the Companies Acts in lieu of their private partnership arrangements." The deed then specified the precise proportions in which the ordinary and preference shares and the debenture stock of the company were apportioned among the partners parties thereto, and then followed the operative part, which, so far as material, was as follows: "Now this indenture witnesseth that in pursuance of the said arrangement and for the purpose of giving effect to the said scheme and of vesting the real estate of the partnership in the said company," the eight parties of the first eight parts conveyed and assigned to the company all the real and leasehold estate and trade-marks of the partnership. No separate or other consideration was stated in the deed.

The question with what stamp duty this instrument was chargeable then arose, and was submitted by the appellants for the opinion of the Commissioners of Inland Revenue, who were informed that the value of the property conveyed thereby was, according to the books of the partnership, the sum of £140,000.

The commissioners were of opinion that the instrument was a

conveyance or transfer on sale, and was chargeable under the head "conveyance or transfer on sale" in the schedule to the Stamp Act, 1870, with the duty of £700 at the least, being the *ad valorem* duty of 5s. for every £50 of the sum of £140,000, and also by reference to § 8 of the same act and the schedule thereto with the duty of 10s., as a deed of any kind whatsoever not described in the schedule, in respect of the other matter contained in the instrument. The duty was assessed and the instrument stamped in accordance with this opinion, and this case was stated to raise the question whether the instrument was chargeable with the duties of £700 and 10s., and if not, with what duty the instrument was chargeable.¹

The case came on and was heard before a Divisional Court consisting of Cave and Wright, JJ., on July 17 and 18, 1893.²

The commissioners appealed; and the appeal was heard on December 11, 1893.

Sir Charles Russell, A. G.; Sir John Rigby, S. G., and Danckwerts for the appellants.

Finlay, Q. C., and A. R. Kirby for the respondents.

LINDLEY, L. J. I confess that, with great deference to Cave, J., I cannot see the difficulty in this case.

The material sections of the act of 1870 must first be considered. [The Lord Justice then read §§ 70, 71 of the Stamp Act, 1870, and continued:] The importance of § 71, to my mind, is this: It shows that there may be a conveyance on sale, although the consideration for it is not cash or money, but may include or consist of stock or marketable securities. The definition of "stock" and "marketable securities" will be found in § 2. Then § 78 imposes a stamp duty on conveyances not otherwise charged, and the schedule shows what the stamps are that are imposed upon conveyances that are charged. First we have "conveyance or transfer whether on sale or otherwise," of certain stocks and dividends. The present case does not come within that head.

¹The material sections of the Stamp Act, 1870 (see now 54 & 55 Vict. c. 39, §§ 54, 55), are as follows:

Sec. 70. "The term 'conveyance on sale' includes every instrument and every decree or order of any court, or of any commissioners whereby any property upon the sale thereof is legally or equitably transferred to or vested in the purchaser or any other person on his behalf or by his direction."

Sec. 71. "Where the consideration, or any part of the consideration, for a conveyance on sale consists of any stock or marketable security, such conveyance is to be charged with *ad valorem* duty in respect of the value of such stock or security."

Sec. 78 imposes a stamp duty on conveyances "not otherwise charged."

²The opinions of Cave and Wright, JJ., have been omitted.—Ed.

Then we have "conveyance or transfer on sale, of any property" . . . "where the amount or value of the consideration for the sale does not exceed £5." That fits in with §§ 70, 71. Then we come to: "Conveyance or transfer by way of security of any property or of any security;" and then we have "Conveyance or transfer of any kind not hereinbefore described." We must accordingly consider under which of these heads the particular deed in this case comes. It certainly does not come under the first nor under "conveyance or transfer by way of security of any property," and the alternative is between "conveyance or transfer on sale" and "conveyance or transfer of any kind not hereinbefore described."

Now, the document in this case is an indenture made between eight gentlemen of the first eight parts, and "John Foster & Sons, Limited (hereinafter called 'the company'), of the ninth part." Pausing there for a moment: although the persons of the first eight parts may be, and were members, and the only members, of John Foster & Co., Limited, John Foster & Co., Limited, is not those eight individuals; John Foster & Co., Limited, is a corporation. We have accordingly two parties, one party consisting of several individuals, and the other party consisting of a corporation. Whether they are or are not the members, or the only members of the corporation, is wholly immaterial. The corporation is a totally different person from them in any capacity you choose to assign to them except a corporate one. [The Lord Justice then stated the recitals in and the operative part of the conveyances, and continued:]

Then the parties of the first eight parts put their seals to the instrument, and the company puts its seal to it. Now, what is that instrument? It is certainly a conveyance of property—that is obvious. In order to amount to a conveyance of property there must be a person conveying and a person taking, and you have them both here. The persons conveying are the persons named in the first eight parts, and the persons taking are the corporation named in the ninth part.

Now, what is the consideration? The consideration for the transfer of this property is, I agree, not money, but it is stocks and securities, which for this purpose are to be regarded as equivalent to money by reason of § 71 of the act to which I have already alluded. Then what have we got? To sum it up shortly, it is a conveyance of property from one person to another, for money, or what is, according to the provisions of the statute, equivalent to money. What is that except a conveyance on sale? What else can you call it? It is certainly not a gift; it is not an exchange; it is not a partition; it is not a mortgage. I do not know what it is

unless it is a conveyance on sale. I do not know what is necessary to constitute a sale, except a transfer of property from one person to another for money, or for the purposes of the Stamp Act, for stock or marketable securities.

But then it is argued that it is only a redistribution of property. I do not consider it a redistribution at all. It is an entire transfer of property from one set of people to another person altogether, and whether there are, as there may well be hereafter, additional persons taking shares in this company, is perfectly immaterial.

Again it is argued on behalf of the appellants that this instrument is in substance nothing more than a conveyance to a trustee to carry on the business in trust for the grantor. Just try that. Supposing there is a conveyance by half a dozen people, transferring their property to a trustee on trust to carry on the business for them, can you in any sense of the word, legal or business-like, or otherwise, call that trustee a buyer? There is no buying, there is no sale to him at all, nor is there any money, or stock, or securities, or anything else parted with by him. Then it was urged that these shares can derive no value unless the company gets this property transferred to them. That is possible enough. That is to say, in other words, that the shares in the company would be valueless unless the company had assets. Of course they would be, but that does not affect the question whether there is a sale or a conveyance or not. I think myself that Cave, J., has attached too little importance to the fact that you have here a distinct seller, and a distinct buyer, and that in point of law it is immaterial that in the present case the buyer is a corporation which consists of the eight persons who formed, and who are, the partners. The appeal must be allowed.

KAY, L. J. I am of the same opinion. With deference to Cave, J., it seems to me impossible to hold that this transaction was anything else than a conveyance on sale. As pointed out on the face of the statute, the consideration may be money or money's worth. Money's worth certainly is sufficiently expressed by a number of shares and debentures of an existing corporation, which, in effect, constituted the consideration for the particular transfer in this case. Now, that there was a conveyance is beyond all question. The persons who are named as vendors in the deed have divested themselves of their property in the subject of that conveyance, and all that property is vested in an entirely independent and separate body—namely, a corporation. Suppose that corporation had consisted of altogether different persons, no one for a moment would doubt that this was a conveyance on sale. Suppose there had been one person in it different, there is nothing that I have heard in the argument which induces me to suppose that even in that

case it could have been doubted that this was a conveyance on sale. But the argument, as I understand it, is this—that the individual corporators who composed that corporation were, in fact, the very identical persons who were conveying this property to the corporation, and the corporation had no other property except this which it took under its conveyance; and that, as the only value of the shares and debentures was derived from this very property which the individual corporators were conveying to the corporation, the conveying partners either got no consideration for that which they conveyed other than part of the property actually conveyed, or they got no consideration at all. Now, I do not follow that argument in the least. I think it is a fallacy from beginning to end. In the first place, a corporation is a different thing from the individuals who compose it; and, secondly, the shares and debentures of a corporation are not the same thing as the property which that corporation owns. You may say, in one sense, that the property is a security for the value of those shares. The value of those shares in the market, which observe are immediately transferable, may depend upon the solvency of the company, the amount of property it possesses, and its chance of carrying on a profitable business. To say that the shares and debentures are part of that property seems to me to be a complete confusion of terms. Suppose the case, which I put during the argument, of a sale of real estate, and the whole of the purchase-money not to be paid at once in cash, but to be secured on mortgage on that real estate; and, if you like, in order to make the analogy perfect, suppose the purchaser had no other property than that property, would the transaction be the less a sale for that reason? Still the consideration given would be a certain amount of cash which would be left on the security of the estate; but I have never yet heard that because the whole of the purchase-money upon a sale of real estate was left on mortgage of the real estate, that for that reason the transaction ceased to be, or was prevented from being, a sale. Yet, really, that is what the argument in this case comes to. I confess I am not able to agree with it. Nothing else was suggested which should prevent this transaction from being a sale, and it seems to me clearly to be, under the words of this statute, “a conveyance on sale” for a consideration, which, if not money, at least is money’s worth. I, therefore, with all deference to Cave, J., think that his decision must be reversed, and the appeal allowed.

SMITH, L. J. The question in this case is whether the instrument of November 27, 1891, is a conveyance or transfer on sale of any of the property mentioned under the second head—“conveyance or transfer”—in the schedule to the Stamp Act of 1870.

Now, in order to find out what is, or is not, a conveyance or transfer on sale of any property in that second head of the schedule, I must refer to §§ 70, 71 of the act. And, reading both these sections together, it seems to me that the term "conveyance on sale" includes every instrument whereby any property, upon the sale thereof, is transferred to or vested in the purchaser in consideration of any stock or marketable security. That is the definition.

First of all, then, is this an instrument whereby any property is transferred to or vested in the purchaser? I beg to say, Yes. It is an instrument upon the face of which the actual land of the vendors, and the trade-marks which are their property, are transferred to a limited company. I do not think that this is disputed, and it does not appear to me to be disputed so far, in the judgment of my brother Cave; but what he says is that this is not an instrument whereby any property, upon the sale thereof, is transferred. The real pith of his judgment is that the vendors and vendees are the same persons—that the agreement as regards the sale was carried out by the members of the old firm before any company limited came into existence, and that inasmuch as they are the same persons now as then, there is no sale at all; and, therefore, there is no instrument whereby any property upon the sale thereof is transferred. I must here respectfully differ with my brother Cave. It seems to me that the company limited are not the same persons as the eight members of the old firm—they are different altogether. It was admitted by Mr. Finlay in argument, though he entirely took away the ground from under my brother Cave's feet when he said so, that the company limited could maintain a suit for specific performance against the old partners. If that is so, how can they be the same persons? This really shows that they are not the same persons. It is here that I disagree with my brother Cave.

The respondents also contend that there was no consideration. We must read the two sections together. Sec. 70 enacts that: "The term 'conveyance on sale' includes every instrument whereby any property, upon the sale thereof, is transferred to or vested in the purchaser." Then § 71 implies that it may be in consideration of any stock or marketable security. The land and the trade-marks are transferred by this instrument from the eight partners who were the old firm to the new company limited. The land and trade-marks are transferred by this instrument in consideration of what? In consideration of stock or marketable securities, which, undoubtedly, are not the same things as the land and trade-marks themselves, though they may be charges upon the land and trade-marks which are conveyed. It seems to me

that it is untrue to say that in this transaction there has been no consideration passing from the vendee to the vendor. Although charges upon the land and the trade-marks, the consideration comes within the very terms of § 71 itself—"any stock or marketable security."

For these reasons, I prefer the judgment of my brother Wright to that of my brother Cave.

Appeal allowed.

SECTION IV.—THE CORPORATION AS AN INHABITANT, RESIDENT,
OR CITIZEN.

SHAW v. QUINCY MINING CO.

IN THE SUPREME COURT OF THE UNITED STATES, MAY 16, 1892.

[*Reported in 145 United States Reports 444.*]

THIS was a petition for a writ of mandamus to the judges of the Circuit Court of the United States for the Southern District of New York to command them to take jurisdiction against the Quincy Mining Company upon a bill in equity, filed in that court on September 3, 1891, by the petitioner, described in the bill as a citizen of Massachusetts, in behalf of himself and other stockholders of the Quincy Mining Co., against "the Quincy Mining Co., a corporation duly organized under the laws of the State of Michigan, and having a usual place of business in the city, county, and State of New York," and against certain individuals described in the bill as citizens of the State of New York. Upon that bill a subpoena was issued, directed to the Quincy Mining Co., and, as appeared by the marshal's return thereon, was served upon it within the Southern District of New York by exhibiting to its secretary the original subpoena and leaving with him a copy. The Quincy Mining Co. appeared specially, and moved for an order to set aside the service.

At the hearing of the motion, it appeared that the Quincy Mining Co. was a corporation organized for the purpose of mining in the county of Houghton in the upper peninsula of the State of Michigan, under the statute of Michigan of May 11, 1877, c. 113, by § 30 of which "it shall be lawful for any company associating under this act to provide in the articles of association for having the business office of such company out of this State, and to hold any meeting of the stockholders or board of directors of such company at such office so provided for, but every such company having its business office out of this State shall have an office for the transaction of business within this State, to be also

designated in such articles of association;" and that this company, in its articles of association, did provide as follows: "The business office of the company hereby constituted and formed shall be in the city, county and State of New York, and another business office is hereby established at the Quincy mine, in the county of Houghton and State of Michigan."

The order to set aside the service was granted by the court, upon the ground (as stated in its return to the rule to show cause why the writ of mandamus should not issue) "that said Quincy Mining Co. is a corporation created and existing under the laws of the State of Michigan, and is an inhabitant of the Western District of Michigan, and not an inhabitant of the Southern District of New York."

Michael M. Cardozo for the petitioner.

Don M. Dickinson, with whom was *Alfred Russell* on the brief, opposing.

Solicitor General, by leave of court, filed a brief in support of the petition.

John F. Dillon and *J. Hubley Ashton*, by leave of court, filed a brief against it.

GRAY, J., after stating the case as above, delivered the opinion of the court.

The single question in this case is whether under the act of March 3, 1887, c. 373, § 1, as corrected by the act of August 13, 1888, c. 866 (the material parts of which are copied in the margin¹), a corporation incorporated in one State of the Union, and having a usual place of business in another State in which it has

¹"The Circuit Courts of the United States shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, and arising under the Constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or in which controversy the United States are plaintiffs or petitioners, or in which there shall be a controversy between citizens of different States, in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value aforesaid, or a controversy between citizens of the same State claiming lands under grants of different States, or a controversy between citizens of a State and foreign States, citizens or subjects, in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value aforesaid." "But no person shall be arrested in one district for trial in another in any civil action before a Circuit or District Court; and no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant; but where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant." 25 Stat. 434.

not been incorporated, may be sued in a Circuit Court of the United States held in the latter State, by a citizen of a different State.

This question, upon which there has been a diversity of opinion in the Circuit Courts, can be best determined by a review of the acts of Congress, and of the decisions of this court, regarding the original jurisdiction of the Circuit Courts of the United States over suits between citizens of different States.

In carrying out the provision of the Constitution which declares that the judicial power of the United States shall extend to controversies "between citizens of different States," Congress, by the Judiciary Act of September 24, 1789, c. 20, § 11, conferred jurisdiction on the Circuit Court of suits of a civil nature, at common law or in equity, "between a citizen of the State where the suit is brought and a citizen of another State," and provided that "no civil suit shall be brought" "against an inhabitant of the United States," "in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ." 1 Stat. 78, 79.

The word "inhabitant," in that act, was apparently used, not in any larger meaning than "citizen," but to avoid the incongruity of speaking of a citizen of anything less than a State, when the intention was to cover not only a district which included a whole State, but also two districts in one State, like the districts of Maine and Massachusetts in the State of Massachusetts, and the districts of Virginia and Kentucky in the State of Virginia, established by § 2 of the same act. 1 Stat. 73. It was held by this court from the beginning that an averment that a party resided within the State or the district in which the suit was brought was not sufficient to support the jurisdiction, because in the common use of words a resident might not be a citizen, and therefore it was not stated expressly and beyond ambiguity that he was a citizen of the State, which was the fact on which the jurisdiction depended under the provisions of the Constitution and of the Judiciary Act. *Bingham v. Cabot*, 3 Dall. 382; *Turner v. Bank of North America*, 4 Dall. 8; *Abercrombie v. Dupuis*, 1 Cranch, 343; *Hodgson v. Bowerbank*, 5 Cranch, 303; *Brown v. Keene*, 8 Pet. 112, 115. The same rule has been maintained to the present day, and has been held to be unaffected by the Fourteenth Amendment of the Constitution, declaring that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." *Robertson v. Cease*, 97 U. S. 646; *Grace v. American Insurance Co.*, 109 U. S. 278; *Timmons v. Elyton Land Co.*, 139 U. S. 378; *Denny v. Pironi*, 141 U. S. 121.

By the act of May 4, 1858, c. 27, § 1, it was enacted that, in a State containing more than one district, actions not local should "be brought in the district in which the defendant resides," or "if there be two or more defendants residing in different districts in the same State," then in either district. 11 Stat. 272. The whole purport and effect of that act was not to enlarge, but to restrict and distribute jurisdiction. It applied only to a State containing two or more districts; and directed suits against citizens of such a State to be brought in that district thereof in which they or either of them resided. It did not subject defendants to any new liability to be sued out of the State of which they were citizens, but simply prescribed in which district of that State they might be sued.

These provisions of the acts of 1789 and 1858 were substantially re-enacted in §§ 739, 740 of the Revised Statutes.

The act of March 3, 1875, c. 137, § 1, after giving the Circuit Courts jurisdiction of suits "in which there shall be a controversy between citizens of different States," and enlarging their jurisdiction in other respects, substantially re-enacted the corresponding provision of the act of 1789, by providing that no civil suit should be brought "against any person" "in any other district than that whereof he is an inhabitant or in which he shall be found" at the time of service, with certain exceptions not affecting the matter now under consideration. 18 Stat. 470.

The act of 1887, both in its original form, and as corrected in 1888, re-enacts the rule that no civil suit shall be brought against any person in any other district than that whereof he is an inhabitant, but omits the clause allowing a defendant to be sued in the district where he is found, and adds this clause: "But where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant." 24 Stat. 552; 25 Stat. 434. As has been adjudged by this court, the last clause is by way of proviso to the next preceding clause, which forbids any suit to be brought in any other district than that whereof the defendant is an inhabitant; and the effect is that "where the jurisdiction is founded upon any of the causes mentioned in this section, except the citizenship of the parties, it must be brought in the district of which the defendant is an inhabitant; but where the jurisdiction is founded solely upon the fact that the parties are citizens of different States, the suit may be brought in the district in which either the plaintiff or the defendant resides. *McCormick Co. v. Walthers*, 134 U. S. 41, 43. And the general object of this act, as appears upon its face, and as has been often declared by this court, is to contract, not to enlarge, the jurisdic-

tion of the Circuit Courts of the United States. *Smith v. Lyon*, 133 U. S. 315, 320; *In re Pennsylvania Co.*, 137 U. S. 451, 454; *Fisk v. Henarie*, 142 U. S. 459, 467.

As to natural persons, therefore, it cannot be doubted that the effect of this act, read in the light of earlier acts upon the same subject, and of the judicial construction thereof, is that the phrase "district of the residence of" a person is equivalent to "district whereof he is an inhabitant," and cannot be construed as giving jurisdiction, by reason of citizenship, to a Circuit Court held in a State of which neither party is a citizen, but, on the contrary, restricts the jurisdiction to the district in which one of the parties resides within the State of which he is a citizen; and that this act, therefore, having taken away the alternative, permitted in the earlier acts, of suing a person in the district "in which he shall be found," requires any suit, the jurisdiction of which is founded only on its being between citizens of different States, to be brought in the State of which one is a citizen, and in the district therein of which he is an inhabitant and resident.

In the case of a corporation, the reasons are, to say the least, quite as strong for holding that it can sue and be sued only in the State and district in which it has been incorporated, or in the State of which the other party is a citizen.

In *Bank of Augusta v. Earle*, 13 Pet. 519, 588, Chief Justice Taney said: "It is very true that a corporation can have no legal existence out of the boundaries of the sovereignty by which it is created. It exists only in contemplation of law, and by force of the law; and where that law ceases to operate, and is no longer obligatory, the corporation can have no existence. It must dwell in the place of its creation, and cannot migrate to another sovereignty. But although it must live and have its being in that State only, yet it does not by any means follow that its existence there will not be recognized in other places; and its residence in one State creates no insuperable objection to its power of contracting in another."

This statement has been often reaffirmed by this court, with some change of phrase, but always retaining the idea that the legal existence, the home, the domicile, the habitat, the residence, the citizenship of the corporation can only be in the State by which it was created, although it may do business in other States whose laws permit it.

In *Lafayette Insurance Co. v. French*, 18 How. 404, in which an Indiana corporation was sued in Indiana upon a judgment recovered in an action against it in a State court of Ohio upon a contract made in that State, this court, speaking by Mr. Justice Curtis, and referring to *Bank of Augusta v. Earle*, said: "This corpora-

tion, existing only by virtue of a law of Indiana, cannot be deemed to pass personally beyond the limits of that State;" and held that it was bound by the judgment, because it had been allowed by the State of Ohio to make contracts in that State only upon the reasonable and lawful condition of its agent, residing and making contracts there, being deemed its agent to receive service of process in suits upon such contracts; and therefore that such a judgment recovered after such a notice was "as valid as if the corporation had had its habitat within the State." 18 How. 407, 408.

"A corporation," said Chief Justice Waite, "created by and organized under the laws of a particular State, and having its principal office there, is, under the Constitution and laws, for the purpose of suing and being sued, a citizen of that State." "By doing business away from their legal residence, they do not change their citizenship, but simply extend the field of their operations. They reside at home, but do business abroad." *Railroad Co. v. Koontz*, 104 U. S. 5, 11, 12. See also *Paul v. Virginia*, 8 Wall. 168, 181; *Railroad Co. v. Harris*, 12 Wall. 65, 81; *St. Clair v. Cox*, 106 U. S. 350, 354, 356; *Canada Southern Railway v. Gebhard*, 109 U. S. 527, 537.

The same doctrine has been constantly maintained by this court in applying to corporations the judiciary acts conferring on the Circuit Courts of the United States jurisdiction of suits between citizens of different States.

Those acts have never named corporations; and for half a century after the passage of the first act corporations were allowed to sue and be sued in the Circuit Courts, only when all the members of the corporation were, and were alleged to be, citizens of the State which created the corporation. *Bank of United States v. Deveaux*, 5 Cranch, 61; *Hope Insurance Co. v. Boardman*, 5 Cranch, 57; *Sullivan v. Fulton Steamboat Co.*, 6 Wheat. 450; *Breithaupt v. Bank of Georgia*, 1 Pet. 238; *Commercial Bank v. Slocomb*, 14 Pet. 60.

But in *Louisville, etc., Railroad v. Letson*, in 1844, it was adjudged, upon great consideration, that it is sufficient to sustain the jurisdiction that the corporation is created by a different State from that of which the opposite party is a citizen; and Mr. Justice Wayne stated that the court rested its judgment upon the ground "that a corporation created by and doing business in a particular State is to be deemed to all intents and purposes as a person, although an artificial person, an inhabitant of the same State, for the purposes of its incorporation, capable of being treated as a citizen of that State, as much as a natural person," and "is substantially, within the meaning of the law, a citizen of the State which created it, and where its business is done, for all the pur-

poses of suing and being sued." 2 How. 497, 558. And it has ever since been treated as settled that, for these purposes, the members of a corporate body must be conclusively presumed to be citizens of the State in which the corporation is domiciled. *Marshall v. Baltimore & Ohio Railroad Co.*, 16 How. 314, 328; *Covington Drawbridge Co. v. Shepherd*, 20 How. 227, 233; *Ohio & Mississippi Railroad v. Wheeler*, 1 Black, 286, 296; *Muller v. Dows*, 94 U. S. 444; *Steamship Co. v. Tugman*, 106 U. S. 118, 121; *Memphis & Charleston Railroad v. Alabama*, 107 U. S. 581, 585.

In *Insurance Co. v. Francis*, it was held that the act of March 2, 1867, c. 196 (14 Stat. 558; Rev. Stat. § 639, cl. 3), authorizing the removal into the courts of the United States of suits "between a citizen of the State in which the suit is brought and a citizen of another State," did not warrant the removal of an action brought in a court of the State of Mississippi, in which the plaintiff, a citizen of Illinois, alleged that the defendant was a corporation created by the laws of New York, located and doing business in Mississippi under its laws; and Mr. Justice Davis, in delivering judgment, said: "This, in legal effect, is an averment that the defendant was a citizen of New York, because a corporation can have no legal existence outside of the sovereignty by which it was created. Its place of residence is there, and can be nowhere else. Unlike a natural person, it cannot change its domicile at will, and, although it may be permitted to transact business where its charter does not operate, it cannot, on that account, acquire a residence there." 11 Wall. 210, 216.

In *Ex parte Schollenberger*, 96 U. S. 369, 377, Chief Justice Waite said: "A corporation cannot change its residence or its citizenship. It can have its legal home only at the place where it is located by or under the authority of its charter; but it may by its agents transact business anywhere, unless prohibited by its charter, or excluded by local laws." The jurisdiction of the Circuit Court in that case, as well as in *New England Insurance Co. v. Woodworth*, 111 U. S. 138, 146, was maintained upon the ground that the defendant corporation, though incorporated in another State, yet, by reason of doing business in the State in which the suit was brought, and having appointed an agent there as required by its laws, upon whom process against the company might be served, was found in that State, within the meaning of the act of March 3, 1875, c. 137, § 1, then in force, and hereinbefore cited.

The statute now in question, as already observed, has repealed the permission to sue a defendant in a district in which he is found, and has peremptorily enacted that "where the jurisdiction

is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant." In a case between natural persons, as has been seen, this clause does not allow the suit to be brought in a State of which neither is a citizen. If Congress, in framing this clause, did not have corporations in mind, there is no reason for giving the clause a looser and broader construction as to artificial persons who were not contemplated, than as to natural persons who were. If, as it is more reasonable to suppose, Congress did have corporations in mind, it must be presumed also to have had in mind the law, as long and uniformly declared by this court, that, within the meaning of the previous acts of Congress giving jurisdiction of suits between citizens of different States, a corporation could not be considered a citizen or a resident of a State in which it had not been incorporated.

The Quincy Mining Co., a corporation of Michigan, having appeared specially for the purpose of taking the objection that it could not be sued in the Southern District of New York, by a citizen of another State, there can be no question of waiver, such as has been recognized where a defendant has appeared generally in a suit between citizens of different States, brought in the wrong district. *Gracie v. Palmer*, 8 Wheat. 699; *St. Louis & San Francisco Railway v. McBride*, 141 U. S. 127, 131, and cases cited.

This case does not present the question what may be the rule in suits against an alien or a foreign corporation, which may be governed by different considerations. Nor does it affect cases in admiralty, for those have been adjudged not to be within the scope of the statute. *In re Louisville Underwriters*, 134 U. S. 488.

All that is now decided is that, under the existing act of Congress a corporation, incorporated in one State only, cannot be compelled to answer, in a Circuit Court of the United States held in another State in which it has a usual place of business, to a civil suit, at law or in equity, brought by a citizen of a different State.

Writ of mandamus denied.

HARLAN, J., dissented.

78 Rem. 88 - 21, 619

GALVESTON, HARRISBURG & SAN ANTONIO RAIL-
WAY CO. v. GONZALES.

IN THE SUPREME COURT OF THE UNITED STATES, JANUARY
29, 1894.

[Reported in 151 United States Reports 496.]

THIS was an action at law instituted in the Circuit Court for the Western District of Texas at El Paso by the defendant in error, Victor Gonzales, alleged to be "a citizen of the State of Chihuahua, in the Republic of Mexico," against the Galveston, Harrisburg & San Antonio Railway Co., to recover damages to the amount of \$4999 for personal injuries.

The petition alleged the plaintiff to be "a citizen of the State of Chihuahua, in the Republic of Mexico, and that the defendant is a corporation duly incorporated under the laws of the State of Texas, and is a citizen thereof, operating and running cars on the Galveston, Harrisburg & San Antonio railway track from the city of Houston to the city of El Paso in the State of Texas, and is a common carrier of freight and passengers for hire, . . . and has and keeps an office and an agent in the said city of El Paso, Texas, for the transaction of its business, with W. E. Jesup as its local agent in said El Paso." The petition further alleged that "on and prior to the 29th day of July, 1889, and ever since that time, the defendant has been engaged in propelling trains and cars on said railway track for the transportation of freight and passengers for hire, as aforesaid, from the city of Houston, in the State of Texas, into and through the county of Jeff Davis, in said State, and through the county of El Paso into the city of El Paso, Texas." The petition further alleged as the cause of plaintiff's action that after having paid his fare to an agent of the defendant, and entered as a passenger on its train from Valentine station to El Paso, he was forcibly and violently ejected from the train while moving at the rate of fifteen miles an hour, thereby causing him to fall to the ground with such force that his leg was broken, and he was thereby crippled for life; for which he prayed judgment in the sum of \$4999.

Defendant appeared specially for the purpose of objecting to the jurisdiction of the court, and pleaded in abatement "that nevertheless, while it admits that defendant operates a line of railway through the county where this suit is pending, and maintains a ticket and freight office and depot, and has an agent on whom process, under the laws of Texas, may be served there, the said defendant is not an inhabitant of the judicial district in which the

suit is pending; that it is a corporation duly incorporated and existing under the laws of Texas, having its principal office, habitat, and domicil in the city of Houston, Harris County, Texas, and beyond and not within this judicial district, but within the Eastern District of Texas." Wherefore the defendant prayed judgment whether the court had jurisdiction, etc.

Plaintiff demurred to this plea, setting up that the defendant was an inhabitant of the Eastern District of Texas.

The case came on to be heard upon this plea in abatement and demurrer, and the court, being of the opinion that the law was for the plaintiff, and that the court had jurisdiction, sustained the demurrer, proceeded to a trial of the case upon the merits, and submitted it to a jury, who rendered a verdict for the plaintiff in the sum of \$900.

Defendant sued out this writ of error under the authority of the act of February 25, 1889, c. 236, 25 Stat. 693, authorizing this court to review questions of jurisdiction of the Circuit Court without reference to amount.

J. Hubley Ashton, with whom was *Charles H. Tweed* on the brief, for plaintiff in error.

No appearance for defendant in error.

BROWN, J., after stating the case, delivered the opinion of the court.¹

This case raises the question whether a railway company, incorporated under the laws of a certain State, and having its principal offices within one district of such State, can be said to be an inhabitant of another district of the same State, through which it operates its line of road and in which it maintains freight and ticket offices and depots.

We have no doubt of our authority under the act of February 25, 1889, to review the decision of the court below sustaining its jurisdiction over the case; and we have already held that the provision of the Texas statute which gives to a special appearance, made to challenge the court's jurisdiction, the force and effect of a general appearance, so as to confer jurisdiction over the person of the defendant, is not binding upon the Federal courts in that State. *Southern Pacific Railway v. Denton*, 146 U. S. 202; *Mexican Central Railway v. Pinkney*, 149 U. S. 194.

By section 1 of the act of August 13, 1888, c. 866, 25 Stat. 433, revising the jurisdiction of the Circuit Courts, it is enacted that "no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, but where the jurisdic-

¹Portions of the opinion containing a citation and discussion of cases have been omitted.—Ed.

tion is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant;” and by Rev. Stat. § 740, “when a State contains more than one district, every suit not of a local nature, in the Circuit or District Courts thereof, against a single defendant, inhabitant of such State, must be brought in the district where he resides.” The above provision of the act of 1888 is manifestly a restriction upon the jurisdiction conferred by the act of March 3, 1875, c. 137, 18 Stat. 470, which contained a similar provision, but with the additional privilege of bringing such suit within any district “in which he,” the defendant, “shall be found at the time of serving such process or commencing such proceeding.”

It will be noticed that in this as well as in prior acts regulating the jurisdiction of the Circuit Courts, a distinction is made between citizens of States and inhabitants of districts. This distinction has been carefully observed in all the principal adjudications upon the construction of these statutes, and, for the purpose of determining the habitancy of a railway corporation, it is pertinent to refer to some of these cases. In one of the earliest—namely, *Picquet v. Swan*, 5 Mason, 35, 46, a suit was begun by trustee process or writ of garnishment sued out by an alien against a defendant, described as “now commorant of the city of Paris in the kingdom of France, of the city of Boston in the commonwealth of Massachusetts, one of the United States of America, and a citizen of the said United States.” The process was served by the attachment of a lot of land in Boston belonging to the defendant, and by summoning his agent to appear and show cause. The defendant never appeared as a party to the suit; and it was contended that the plaintiff was entitled to consider him in default, and to have judgment. It was held, however, by Story, J., that where a party defendant was a citizen of the United States, but resident in a foreign country, having no inhabitancy in any State of the Union, the Circuit Courts had no jurisdiction over him in a suit brought by an alien, though his property were attached in the district. The case involved the construction of that clause of the eleventh section of the Judiciary Act of September 24, 1789, c. 20, 1 Stat. 73, 78, which provided that “no civil suit shall be brought before either of said courts against an inhabitant of the United States, by any original process in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ.” It will be noticed that the words used are “inhabitant of the United States,” not “inhabitant of a district,” and, in speaking of these words, Story, J., said: “I lay no particular stress upon the word ‘inhabitant,’ and deem it a mere

equivalent description of 'citizen' and 'alien' in the general clause conferring jurisdiction over parties." That he meant the word "inhabitant" as "inhabitant of the United States" is evident from what follows: "A person might be an inhabitant, without being a citizen; and a citizen might not be an inhabitant, though he retain his citizenship. Alienage or citizenship is one thing; and inhabitancy, by which I understand local residence, *animo manendi*, quite another. I read, then, the clause thus: 'No civil suit shall be brought before either of said courts *against an alien or a citizen*, by any original process, in any other district than that whereof he is an inhabitant, or in which he shall be found, at the time of serving the writ.' It cannot be presumed that Congress meant to say, that if an alien or a citizen were not an inhabitant of, or commorant in, the *United States*, a suit might be maintained against him in any district, and process served abroad upon him, or judgment given against him without any notice or process served upon him." There is nothing here which indicates that Story, J., confounded citizenship of a State with inhabitancy of a district.

These cases must be regarded as establishing the doctrine that a domestic corporation is both a citizen and an inhabitant of the State in which it is incorporated; but in none of them is there any intimation that, where a State is divided into two districts, a corporation shall be treated as an inhabitant of every district of such State, or of every district in which it does business, or, indeed, of any district other than that in which it has its headquarters, or such offices as answer in the case of a corporation to the dwelling of an individual.

We are, therefore, compelled to determine the question of the domicile of a corporation either by a resort to general principles of law, or to local statutes fixing such domicile. An individual is almost universally held to be an inhabitant of the place in which he dwells, and though he do business for a long time in another place, he will not be regarded as changing his domicile so long as the *animus revertendi* continues. Thus in *Jopp v. Wood*, 34 Beavan, 88; S. C. 4 De G., J. & S. 616, it was held that a Scotchman engaged in business in India for twenty-five years did not thereby change his domicile. And in *In re Capdevielle*, 2 H. & C. 985, it was similarly held with regard to a Frenchman who had resided and engaged in business in England for twenty-nine years. In the case of a corporation the question of inhabitancy must be determined, not by the residence of any particular officer, but by the principal offices of the corporation, where its books are kept and its *corporate* business is transacted, even though it may transact its most important business in another place. It is but a

corollary of the proposition laid down in the three cases above referred to, that if the corporation be created by the laws of a State in which there are two judicial districts, it should be considered an inhabitant of that district in which its general offices are situated, and in which its general business, as distinguished from its local business, is done.

If there were any doubt upon this subject, it would be removed by reference to the following provisions of the Texas statutes upon the domicil of railway corporations.¹

There are doubtless reasons of convenience for saying that a corporation should be considered an inhabitant of every district in which it does business, and so the statutes of the several States generally provide; but the law contemplates that every person or corporation shall have but one domicil, and in the case of the latter, it shall be in that State by whose laws it was created, and in that district where its general offices are located.

This court having held, in the cases heretofore referred to, that a corporation cannot be considered an inhabitant of any State in which it is not incorporated, by reason of the fact that it does business, or in the case of a railroad, that it runs its road through such State, it would seem inconsistent to hold that it is an inhabitant of a district by reason of the same facts, unless the distinction between citizenship and inhabitancy is to be wholly abolished. As said by Story, J., in *Picquet v. Swan*, alienage or citizenship is one thing, and inhabitancy quite another. In the Constitution and laws of the United States citizenship is affirmed of a State, or of the United States; inhabitancy may be affirmed either of the United States, a State, or a subordinate locality. Nor in our view does it make any difference that the *plaintiff* is an alien instead of a citizen. The provision that no civil suit shall be brought against any person in any other district than that whereof he is an inhabitant, is of universal application, except, that, if the plaintiff be also a *citizen*, he may bring it in his own district, if he can obtain service upon the defendant in that district. The purpose of this is, that the plaintiff may have the same advantage of litigation in his own district that the defendant has. An alien, however, is assumed not to reside in the United States, and hence must resort to the domicil of the defendant. On the other hand, if the suit be *against* the alien, he may doubtless, under Hohorst's case, be sued in any district wherein he is found. It was not meant or intimated, however, in that case that the clause in question had no application to cases where an alien was plaintiff, but only where he was defendant.

¹So much of the opinion as relates to the Texas statutes has been omitted.
—ED.

On the contrary, both the decision and the reasoning in that case were carefully limited to a suit brought by a citizen *against* an alien. At the conclusion of the discussion of that question, the point decided was stated to be "that the provision of the existing statute, which prohibits suit to be brought against any person 'in any other district than that whereof he is an inhabitant,' is inapplicable to an alien or a foreign corporation sued here, and especially in a suit for the infringement of a patent right; and that, consequently, such a person or corporation may be sued by a citizen of a State of the Union in any district in which valid service can be made upon the defendant." The provision in terms relates to defendants only; and the reasoning that it could not include an alien defendant, because he was not an inhabitant of any district in the United States, has no application to a defendant citizen, who is confessedly and necessarily an inhabitant of some one of those districts.

The judgment of the court below must, therefore, be reversed, and the case remanded for further proceedings in conformity to this opinion.¹

¹The dissenting opinion of Jackson, J., concurred in by Harlan, J., has been omitted.—Ed.

CHAPTER II.

THE CORPORATION AND THE STATE.

SECTION I.—CREATION OF CORPORATION.

(a) *By special act.*

THE STATE ON THE RELATION OF WEIR, ETC., *v.* DAWSON AND OTHERS.

IN THE SUPREME COURT OF INDIANA, MAY 27, 1861.

[*Reported in 16 Indiana Reports 40.*]

APPEAL from the Clark Circuit Court.

PERKINS, J. Information against the defendants, charging that they are pretending to be a corporation, and to act as such, when they are not a corporation. It charges that in January, 1849, the legislature of the State of Indiana enacted a special charter of incorporation (which is set out at length), for a railroad from Fort Wayne, Indiana, to Jeffersonville, to be called the Fort Wayne & Southern Railroad; that the persons named in the charter as directors did not accept said charter till June 2, 1852, when they did meet and accept the same, and organize under it. It is alleged that the defendants are assuming to act under said charter, never having organized under any other. The court below sustained a demurrer to the information; thus holding the defendants to be a legal corporation.

The present Constitution of Indiana took effect on November 1, 1851. It contains these provisions:

"All laws now in force and not inconsistent with this Constitution, shall remain in force, until they shall expire or be repealed." Sched. (1 sub. sec.) of Const.

"Corporations, other than banking, shall not be created by special act, but may be formed under general laws." Art. 11, § 13.

"All acts of incorporation for municipal purposes shall continue in force under this Constitution, until such time as the General Assembly shall, in its discretion, modify or repeal the same." Sched. *supra*, sub. sec. 4.

The charter for the Fort Wayne & Southern Railroad was

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not a charter for municipal purposes, and, hence, was not specially continued in existence. Art. 11, § 13, above quoted, prohibits the creation of a corporation by special act or charter, that is, as we construe the prohibition, through, or by virtue of, such special act or charter, after November 1, 1851. The policy that induced the prohibition, as well as its literal import, demands this construction. It is necessary for us to ascertain, then, when the defendants, if ever, were created a corporation. The simple enactment of the charter for the corporation, by the legislature, did not create the corporation. It required one act on the part of the persons named in the charter to do that—namely, acceptance of the charter enacted.

Says Grant, in his work on corporations, *vide* p. 13: "Nor can a charter be forced on any body of persons who do not choose to accept it." And again, at page 18, he says, "The fundamental rule is this: no charter of incorporation is of any effect until it is accepted by a majority of the grantees, or persons who are to be the corporators under it. Bagge's case, 2 Brownl. & G. 100; S. C. 1 Roll. Rep. 224; Dr. Askew's case, 4 Burr. 2200; Rutter *v.* Chapman, 8 M. & W. 25; per Wilmot, J., *Rex v. Vice-Chancellor, of Cambridge*, 3 Burr. 1661. This is analogous to the general rule that a man cannot be obliged to accept the grant or devise of an estate. *Townson v. Tickell*, 3 B. & Ald. 31." See, also, Ang. & Am. § 83, where it is said, if a charter is granted to those who did not apply for it, the grant is said to be *in fieri* till acceptance. We need not inquire whether this rule extends to municipal corporations in this country. As to what may constitute an acceptance we are not here called on to decide, as the information expressly shows that there was none in this case till June, 1852, which fact is admitted by the demurrer.

The grant of the charter in question, then, to those who had not applied for it, was but an offer, on the part of the State; a consent that the persons named in the charter might become a corporation, might be created such an artificial being, by accepting the charter offered. But an offer, till accepted, may be withdrawn. In this case, the offer made by the State, in 1849, was withdrawn by the State, November 1, 1851, by then declaring that no corporation, after that date, should be created except pursuant to regulations which she, in future, through her legislature would prescribe.

This pretended corporation, then, was not created before November 1, 1851; and it could be created afterward only by the concurrent consent of the State and the corporators. But, at that date, the Constitution prohibited both the State and corporators from giving consent to such a corporation, to wit: one coming into ex-

istence through a special charter ; and hence necessarily prohibited the creation thereof. This decision accords with that of the Supreme Court of the United States in *Aspinwall v. Daviess County*, 22 How. p. 364 ; where it was held that the new Constitution prohibited a subscription of stock to the Ohio & Mississippi Railroad Co., authorized by the charter of the corporation, granted under the former Constitution, and actually voted by the people of the county, under that Constitution.

Whether, as a matter of fact, the charter in this case was accepted under the old Constitution, must be determined on a trial of the cause below.

Had the provision in our Constitution, like that on this subject in the Constitution of Ohio, ordained that the legislature should "pass no special act conferring corporate powers," the restraint would clearly have been imposed alone upon future legislative action ; but, in our Constitution, the restraint is plainly imposed upon the creation, the organization, of the corporation itself. See *The State v. Roosa*, 11 O. St. R. 16.

Per curiam. The judgment is reversed, with costs. Cause remanded for further proceedings in accordance with this opinion.

C. B. Smith, J. W. Gordon, and Watt J. Smith for the appellant.
R. Crawford for the appellees.

PATRICK WALSH, APPELLANT, *v.* THE TRUSTEES OF
THE NEW YORK AND BROOKLYN BRIDGE,
RESPONDENTS.

IN THE COURT OF APPEALS OF NEW YORK, OCTOBER 7, 1884.

[*Reported in 96 New York Reports 427.*]

APPEAL from judgment of the General Term of the Supreme Court, in the second judicial department, entered upon an order made December 12, 1883, which affirmed a judgment in favor of the defendants, entered upon an order sustaining a demurrer to the complaint herein.

The nature of the action is stated in the opinion.

Charles J. Patterson for appellant.

W. N. Dykman for respondent.

EARL, J. While the New York and Brooklyn Bridge was being constructed, a laborer employed thereon carelessly let a plank fall from the suspended structure, which struck and injured the plain-

tiff, who was at the time passing upon a street within the city of New York, and he brought this action to recover for his injuries. The defendant demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action, and it had judgment upon the demurrer, which was affirmed at the General Term.

The theory of the complaint is that the defendant is a corporation¹ and that the laborer was in its employ, and that it was responsible for his carelessness as his superior, and it is only upon this theory that the action can be maintained.

We are of opinion that the bridge trustees were either agents of the State or agents of the two cities of New York and Brooklyn for the construction of the bridge, and hence that they were not the legal superiors of the laborer and were responsible only for their own personal misconduct or negligence.

The first act for the construction of the bridge was the act, chapter 399 of the Laws of 1867, which created a body corporate by the name of "the New York Bridge Co." The corporation was to have a board of trustees, and a capital stock divided into shares. It was provided in the act that the two cities might, upon the terms mentioned, at any time, take the bridge and acquire all the property therein. If the bridge had been built by that corporation and the power had been exercised in behalf of the two cities, the corporation would, *ex necessitate*, have ceased to exist, and the bridge would have been a free bridge, maintainable by the two cities as the owners thereof. The act also provided that the two cities could subscribe for and take shares of the capital stock, or guarantee the bonds of the corporation, and this power was to some extent exercised by subscriptions to the stock.

That act was amended by the act, chapter 26 of the Laws of 1869, which authorized each of the two cities to be represented in virtue of the stock held by it by three of its officers in the board of directors of the corporation, the other directors to be chosen by the other stockholders.

The act of 1867 was again amended by the act, chapter 601 of the Laws of 1874. The first section provided that when the two cities should accept the provisions of the third section of the act, and when the owners of two-thirds of the private stock of the corporation should accept the provisions of the second section, the board of directors of the corporation should consist of twenty members to be appointed as follows: Eight by the mayor and comptroller of each city; and such mayors and comptrollers were to be *ex officio* members of the board. Sec. 2 provided that

¹Only so much of the opinion is given as relates to this question.—ED.

whenever any private stockholder should give his assent as therein mentioned, the directors might, on behalf of the two cities, purchase his stock; and sec. 3 declared the bridge to be a public highway between the two cities, subject to tolls, and authorized the two cities to subscribe for additional stock. That act left the corporation still existing with the two cities and the private stockholders owning and holding all the stock. But before any subscriptions to the stock were made under that act by the two cities, the constitutional amendments took effect January 1, 1875, sec. 11 of art. 8 of which provides as follows: "No county, city, town, or village shall hereafter give any money or property, or loan its credit to, or in aid of any individual, association or corporation, or become directly or indirectly the owners of stock in or lands of any association or corporation; nor shall such county, city, town, or village be allowed to incur any indebtedness, except for county, city, town, or village purposes." It therefore became necessary to destroy the bridge corporation before the two cities could make any further contributions to the construction of the bridge, and for that purpose the act, chapter 300 of the Laws of 1875, was passed. That act is entitled "An act providing that the bridge in the course of construction over the East River, between the cities of New York and Brooklyn, by the New York Bridge Co., shall be a public work of the cities of New York and Brooklyn, and for the dissolution of said company, and the completion and management of the said bridge by the said cities." Sec. 1 provides that whenever two-thirds of the private stock of the corporation shall have been retired by the purchase of the same, as provided in the act of 1874, the corporation shall be dissolved, and the debts and liabilities of the same shall be paid by the trustees of the bridge, and the bridge shall be completed and managed in behalf of the two cities as a consolidated district. Sec. 2 provides that the mayor, comptroller, and president of the board of aldermen of the city of New York shall appoint eight persons, and the mayor, comptroller, and city auditor of the city of Brooklyn shall appoint eight persons as trustees, and that the persons so appointed, together with the mayors and comptrollers of the two cities, shall constitute the board of trustees of the bridge, and shall have full power, control, and direction over the plan and construction thereof; that the trustees so appointed shall hold office for two years, and all vacancies happening by the expiration of any term or otherwise shall be filled by appointment in the same way. Sec. 3 provides that from and after the dissolution of the corporation, the bridge shall be a public work to be constructed by the two cities for the accommodation, convenience, and safe travel of the inhabitants thereof, and that the expense of constructing and

maintaining the same, and acquiring the land necessary therefor, and all liabilities imposed upon the two cities, or incurred by them by virtue of the act, shall be defrayed by them in the proportion of two-thirds parts by the city of Brooklyn and one-third part by the city of New York, the money to be provided by the two cities upon calls made by the trustees. Sec. 4 provides that on the completion of the bridge the income derived from the same shall be applied toward the payment of the principal and interest of all bonds issued by the two cities for the bridge, in proportion to the amount issued by the cities respectively. Sec. 5 provides that the trustees shall have power "to purchase, acquire, and hold" for the two cities conjointly as much real estate as may be necessary for the purposes of the bridge, to make and establish ordinances and laws regulating the use of the bridge, under reasonable penalties to be recovered in their behalf and in their name by the title of "The Trustees of the New York and Brooklyn Bridge," to keep and maintain the bridge in good and proper condition, and in case of injury or damage thereto, to repair and restore the same; and that for that purpose the two cities shall provide and pay them the necessary means in the proportions mentioned. Sec. 6 provides that the trustees shall have power to make needful rules and by-laws for the government of their board; to appoint one of their number president, and also a secretary and treasurer, and such other officers and subordinates as may be necessary for the performance of their duties, and to fix their compensation; that until otherwise determined by the trustees, the officers of the corporation at the time of the dissolution thereof shall be the officers of the board of trustees; and that they shall present a monthly statement of their receipts and expenditures to the mayors of the two cities. Sec. 10 provides that in case the trustees shall be unable to acquire the necessary real estate by purchase, they shall have the right to acquire the same by proceedings in the exercise of the right of eminent domain, and that the title thus acquired shall vest in the two cities in the shares mentioned; that no action or proceeding by or against the New York Bridge Co. shall abate or terminate by the dissolution of the corporation, but that the court may substitute the trustees as a party to such action or proceeding; that all property or assets of the corporation at the time of its dissolution shall remain liable for the debts and obligations of the company, and that any proceedings by the corporation to acquire real estate pending at its dissolution, may be prosecuted by the trustees to a final determination, and the title acquired thereby shall vest in the two cities as before provided. Sec. 11 provides that in case any private stockholder of the bridge corporation shall have declined to sell his stock as

provided in sec. 2 of the act of 1874, the trustees shall proceed at once to acquire the same for and on behalf of the two cities in the manner provided in the preceding section for the taking of real estate. Sec. 12 provides that upon the dissolution of the bridge corporation as provided in the act, the bridge and all its appurtenances, and all the property and effects connected therewith, shall vest absolutely in the two cities, in shares to each of the cities equal to the amount paid, and to be paid by them for the construction of the bridge and the land and appurtenances thereof.

It will be seen by this analysis of the act of 1875, that the bridge corporation was utterly wiped out; that was the main purpose of the act. *People, ex rel. Murphy, v. Kelly*, 76 N. Y. 475. Provision was made for divesting the corporation of all its property, and vesting it in the two cities, not in the bridge trustees. There can be no pretence that there is any language in the act expressly creating a new corporation to take the place of the one dissolved. After the dissolution of the bridge corporation, and the acquisition of all its property, and the interest of all its stockholders on behalf of the two cities, there remained no longer any stock, or any shares of stock, or any fixed capital, or any stockholders. The two cities became the conjoint owners of all the bridge property as the proprietors thereof in certain proportions. There could have been no intention on the part of the legislature to create a new corporation. If there had been an intention to use a corporation for the construction of the bridge, it would not have been necessary to utterly destroy the existing corporation. That could have been so moulded as to suit the new purposes. Such an intention might have defeated the purposes of the act in view of the constitutional amendment then recently adopted. That absolutely prohibits the two cities from giving money or loaning credit to any corporation whatever. Without now determining that the legislature could not have created a private corporation with authority to build this bridge for the sole benefit of the two cities, with money to be furnished solely by them, it is believed, from the language of the act, that the projectors and promoters of the bridge, who procured its passage, meant to avoid the risk of a collision with the Constitution by the creation of a corporation to build and maintain the bridge with the funds and credit of the two cities. Nor, in view of that constitutional provision, should we hold that a corporation was created by implication, and thus bring the act under the possible condemnation of the Constitution. Express words of incorporation need not be used to create a corporation. One may arise without express words of creation out of the general language used in an act where a corporation is necessary to accomplish the

purpose of the act. Here a corporation was not needed to accomplish any of the purposes of the act of 1875. It was not needed to take and hold the bridge property, as that was all vested in the two cities. It was not needed to take and hold the real estate to be acquired for the bridge, as that was all to be vested in the same way. Every purpose of the act could be accomplished by the trustees acting for and on behalf of the two cities as their representatives and agents, the cities furnishing all the corporate capacity needed to hold and perpetuate indefinitely the bridge and the property and franchises connected therewith.

The language in sec. 5 of the act, which empowers the trustees "to purchase, acquire, and hold" for the two cities real estate, did not authorize them to take the title to the real estate in their own names as trustees. They were to purchase and acquire the title on behalf of the two cities and in their names, and to hold it as trustees for them. Other parts of the act, if this were doubtful, make it plain. All the real estate owned by the bridge corporation at the time of its dissolution, and all that should be acquired by hostile proceedings under sec. 10, were in terms vested in the two cities; and it could not have been the legislative intention that a portion of the real estate should be vested in the trustees and a portion in the cities.

The authority conferred upon the trustees by sec. 5, to sue for penalties in the aggregate name of "the trustees of the New York and Brooklyn Bridge," and the authority under sec. 10 to substitute the trustees as a party to any action pending for or against the corporation, do not show a legislative intention to create a corporation nor raise one by implication. The legislature could have authorized the same actions and proceedings to be maintained in the name of the president of the board of trustees, or in the name of any other officer or agent of the cities, or of either of them. All that was mere matter of convenience. It is not uncommon for statutes to endow administrative boards which are organized for public purposes, and are mere public agents, with capacity to sue and be sued by an aggregate name. The name in which these trustees were authorized to sue was not given to them as a corporate name. They were not a self-perpetuating body; they owned no property, and whatever money they should recover for penalties or receive from any source, and whatever personal property should at any time be in their possession, they would be obliged to hold and administer for the benefit of the two cities for the precise purposes mentioned in the act. They represented and acted for the two cities as their agents just as the water commissioners represented the city of New York in the cases of *Appleton v. Water Commissioners*, 2 Hill, 432, and

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Bailey *v.* Mayor, etc., 3 *id.* 53^r, and 2 Denio, 433; as the board of public works represented the District of Columbia in the case of Barnes *v.* District of Columbia, 91 U. S. 540; as the Rochester water commissioners represented the city of Rochester in 66 N. Y. 413, and as the park commissioners represented the city of New York in the case of Ehrgott *v.* Mayor,¹ recently decided by us. In all the cases mentioned the commissioners and boards had powers quite as absolute and independent as those possessed by these trustees, and yet they were held to be mere agents of the municipalities which they represented.

In *Ex parte* Newport Marsh Trustees, 16 Sim. 346, the trustees were held to be a corporation by implication because a corporation was necessary for the purposes of the act of Parliament creating them. In the Mersey Docks Cases, 11 H. of L. Cas. 687, "the Mersey Docks and Harbor Board" was expressly created a corporation by act of Parliament.

The litigation in the case of Miller *v.* Mayor, etc., 13 Blatchf. 469; 109 U. S. 385, and that in the case of People, *ex rel.* Murphy, *v.* Kelly, 76 N. Y. 475, were conducted through all their stages without the presence as a party of "the Trustees of the New York and Brooklyn Bridge," as a corporation, and yet if there was such a corporation, its presence as a party was necessary to a proper determination of those cases. In the latter case it was said: "The act of 1875 is not, as claimed by the appellant, in conflict with the constitutional provision above recited. It was not the purpose or effect of the act to make the city of New York a stockholder in the bridge company, or to cause it to loan any money or credit to such company. It was the purpose of the act to extinguish the company, and vest all its property in the two cities for a public purpose."

So far the discussion has proceeded without noticing the fact that the complaint alleges that the defendant is a domestic corporation, and if that is to be taken as a pure allegation of fact, then it is admitted by the demurrer. But such effect has not been claimed for the allegation on the argument before us. We must take notice of the public acts authorizing the construction of the bridge, and those acts may be read as if embodied in the complaint, and then the allegation that the defendant is a corporation is a mere conclusion of law not admitted by the demurrer. We must look at the acts to see whether it is a corporation or not, and we have reached the conclusion, for the reasons which we have given, that it is not.

It follows that no judgment could in this action be rendered

¹*Ante*, p. 264.

against "the trustees of the New York and Brooklyn Bridge" as a corporation.

The judgment should be affirmed, with costs.

All concur.

Judgment affirmed. ✓

JONATHAN H. B. SMITH v. THE SILVER VALLEY
MINING CO. AND OTHERS.

IN THE COURT OF APPEALS OF MARYLAND, JUNE 24, 1885.

[Reported in 64 Maryland Reports 85.]

APPEAL from the Circuit Court of Baltimore City.

The case is stated in the opinion of the court.

The cause was argued before Alvey, C. J.; Yellott, Miller, Robinson, Irving, and Ritchie, JJ.

William S. Bryan, Jr., and William M. Merrick for the appellant.

N. Penniman Bond and Rufus W. Applegarth for the appellees.

MILLER, J., delivered the opinion of the court.

The charter of the "Silver Valley Mining Co." was granted by the legislature of North Carolina by an act which was ratified on the 15th of February, 1861.

The title of this statute is "An Act to incorporate the Silver Valley Mining Co., in the County of Davidson." By the first section it is enacted that *five named persons* and "their associates, successors, and assigns, be and they are hereby created and constituted a body politic and corporate, by the name and style of the Silver Valley Mining Co., for the purpose of working, mining, and exploring for silver, gold, copper, iron and all other metals and minerals, and for mining, rending, smelting and working the same, and by that name may sue and be sued." "May have a common seal, and may enjoy all the privileges and powers incident to mining or smelting corporations, and may also purchase, hold and convey any real or personal property or estate as capital stock, to the amount of one million of dollars."

The second section provides "that the said corporation may divide their stock into such number of shares, and may provide for the sale and transfer thereof in such manner and form as said corporation shall from time to time deem expedient, and may levy and collect assessments, forfeit and sell delinquent shares, declare and pay dividends on the shares, and may make, alter and repeal

"Leave out
no reason
for it,
they will."

Bent 285, 286

such by-laws and regulations as said corporation may deem necessary, not repugnant to the laws of this State and of the United States."

The third section makes it "lawful for the said corporation to be managed by three or five directors, two of whom at least shall be residents of this State, who shall have power to fill vacancies in their own body, shall continue in office until others are elected or appointed, and shall exercise all such rights as by this act are conferred and granted; but the stockholders shall have the right to elect said directors annually." By the other sections it is enacted that the aforesaid five named corporators "shall manage the affairs of said corporation *as directors* until others are elected or appointed," that the "corporation shall exist for thirty years, and that this act shall be in force from and after its ratification."

The appellant by his bill in this case filed in February, 1880, avers that in March, 1869, he became the holder of a certificate which justly and legally entitled him to the ownership of 1800 shares of the capital stock of this corporation, each of greater value than one dollar, and his complaint is that at a meeting of the directors held in Baltimore in February, 1879, a resolution was passed imposing an assessment of two cents a share, and declaring that if this was not paid before the 31st of March following, the stock on which it was not paid should be forfeited to the corporation and sold for its benefit, and that his stock was under this assessment declared forfeited, and the form of a sale thereof had. He charges that the directors had no right to hold a meeting for this purpose out of the State of North Carolina, and that their proceedings in the premises were wholly void; that he had no notice of the proceedings of this meeting until many months afterward, though he was and has been for many years a resident of Baltimore, and that the directors and other authorities of the corporation did not wish their said proceedings to be known by him; that no suitable or effective means were taken to give notice thereof even by advertisement in the public papers, the same having been, as he is informed, published in a paper which he does not take and very seldom sees; that the pretended sale of his stock was made to Wilkins, the president, and Denison, the treasurer of the corporation, and that these pretended proceedings of forfeiture were carried out by their influence, co-operating with other persons who are unknown to him; that shortly after these proceedings came to his knowledge, he made, through his counsel, a formal tender to the president of the amount of the assessment with interest thereon, and demanded to be reinstated in the possession and enjoyment of his stock, but this demand was refused; that all these proceedings purporting to forfeit his stock are merely

illusory, have been carried out for the benefit of Wilkins and Denison, officers of the corporation as aforesaid, and that they are not only void in law by reason of holding the meeting beyond the limits of the State which granted the charter, and by reason of the attempt to deprive him of his property without notice in contravention of the first principles of justice, and of the organic law of the State of North Carolina as it existed at the time this corporation was chartered, but that they are by reason of the facts above stated, inequitable, unjust and in fraud of his rights.

The bill then prays that the company and Wilkins and Denison may severally answer under oath, and set forth explicitly and fully the proceedings whereof the forfeiture of his stock is alleged to have occurred, and may discover when, by whom, and to whom it was sold and at what price, who is now the holder or ostensible holder thereof, and for whose benefit and interest the same is held, why they did not give greater publicity to their said proceedings, and the names of the persons who combined and co-operated with them in the formation and consummation of the attempt to forfeit his stock, if any such persons there be, and to whose benefit the supposed forfeiture and sale have inured; that these proceedings of the corporation may be declared to be null and void, that the supposed forfeiture and sale may be annulled, that he may be reinstated in the possession and enjoyment of his said stock, that the said company and Wilkins and Denison may be forever enjoined and prohibited from setting up this supposed forfeiture, and from claiming any benefit therefrom, and that he may have full and fair compensation from them on account of the premises, and for general relief.

All the defendants filed a demurrer to the bill, which was overruled. They then filed separate answers in which they put the complainant upon proof of his ownership of stock, deny all the charges of combination or fraud, set out the proceedings under which the forfeiture and sale were made, and insist that the same were duly and lawfully conducted, and are legal and valid. Proof was then taken, and upon the hearing the court below passed a decree dismissing the bill, and from that decree this appeal is taken.

It thus appears that one of the grounds upon which the bill assails the validity of the forfeiture is, that the meeting of the directors at which the proceedings to that end were adopted was not held within the limits of the sovereignty granting the charter; but another question is presented, and this goes to the corporate existence of this company at the time the appellant became a holder of its stock. The mere grant of a charter like this, where it does not appear upon the face of the incorporating act, or other-

wise, that the named corporators applied for it, does not create the corporate body. Something more must be done. There must be at least an acceptance of the grant by a majority of the corporators, before corporate life and existence can begin. Angell & Ames on Corp. (11 Ed.), § 81; Morawetz on Private Corp., §§ 14, 17; Boone on Corp, § 23. Nor is this a case in which acceptance is to be presumed or inferred from the assumption and exercise of the corporate powers, for the proof clearly shows when, where, and how this charter was accepted. The testimony is explicit and without contradiction, that the named corporators held their first meeting in the city of Baltimore on the 5th of March, 1861, less than a month after the passage of the act, and that on the next day (March 6, 1861) they accepted the charter at a meeting held by them at the same place. It also appears that at the same time or shortly thereafter, they elected a president, secretary and treasurer, adopted a seal, determined upon the number and par value of the shares of capital stock, and in fact did everything pertaining to the organization of the company, at meetings held by them at the same place. In short, the proof is direct and positive, that no official meeting either of the corporators, stockholders or directors was ever held in North Carolina until the spring of 1882, nearly two years after this bill had been filed. In view of the fact that all these corporate acts are thus clearly proven to have been done out of the State granting the charter, the question arises as to their validity and the consequent legal existence of this corporation in March, 1869, when the appellant purchased his stock. This question is as directly presented under the averments of the bill and answers in this case as it ever can be in a civil suit. Legal ownership of the stock which is the foundation of the relief prayed is alleged in the bill, and not admitted by the answers. What, then, is the law upon this subject?

It seems to be well settled by the weight of authority that directors may hold meetings, have an office, make contracts, and transact a part, at least, of the general business of the corporation in another State, unless prohibited by local legislation. But the directors when so acting are not the corporate body, but its mere agents. Angell & Ames on Corp., § 104; Balt. & Ohio R. R. Co. *et al v. Glenn et al.*, 28 Md. 287. Nor do we think it makes any difference as to the operation of this rule, that the named corporators, as in this case, are empowered by the charter to manage the affairs of the corporation, and to exercise all such rights as the charter grants, "*as directors*" until others are elected. The two capacities of corporators and directors are distinct, and they cannot do in the latter those acts which the law requires them to do in the former capacity. We find nothing in this charter which dis-

penses with the necessity of its acceptance, and of organization under it, by them as corporators, and certainly nothing which authorizes them, even if the grant of such authority would in any case be valid, to do these acts in another State. But while the directors may thus act as agents of the corporation, it has, ever since the decision of the Supreme Court in the case of the Bank of Augusta *v.* Earle, 13 Peters, 519, been the recognized rule of American law, that a corporation can have no legal existence out of the boundaries of the sovereignty by which it is enacted; that it exists by force of the law, and where that ceases to operate the corporation can have no existence; that it must dwell in the place of its creation and cannot migrate to another sovereignty; and that it cannot hold meetings, pass notes, or do any corporate acts strictly so called outside of that sovereignty. Angell & Ames on Corp., § 104; Green's Brice's *Ultra Vires*, 442, note *a*; Boone on Corp., § 66.

The two cases most generally cited in illustration and application of this rule are *Miller v. Ewer*, 27 Maine, 509, and *Freeman v. Machias Water Power & Mill Co.*, 38 Maine, 343. The former was a writ of entry to recover a tract of land in the State of Maine, and the demandants claimed title through a mortgage thereof executed by the president and secretary of the Bluehill Granite Co., a corporation chartered by that State in 1836. It appeared in proof that shortly after the date of the charter, a meeting of the corporators, for organization under it, was called and held in the city of New York, that the charter was there accepted, and the officers of the corporation, president, secretary, and directors, were there chosen; that at a meeting of the directors held in the same city in April, 1837, the president and secretary were authorized by vote to execute the mortgage in question, which they accordingly did, and there was no proof that any meeting for the organization of the company, or for the choice of its officers, had ever been held in the State of Maine. The court upon this proof held that the mortgage passed no title because the directors who ordered its execution were not lawfully chosen, and by a process of reasoning which seems to us entirely sound, reached the conclusion and laid down the proposition "that all votes and proceedings of persons professing to act in the capacity of corporators when assembled without the bounds of the sovereignty granting the charter are wholly void." The court also in its opinion delivered by Shepley, J., reviewed the only two cases, those of *Copp. v. Lamb*, 3 Fairfield, 314, and *McCall v. Byram Manuf. Co.*, 6 Conn. 428, which had seemingly decided the contrary, and showed that in them the question was either not examined or not presented for decision.

In the other case a party sued the corporation for dividends upon his stock, which he alleged had been illegally forfeited. There also it appeared that the act of incorporation was passed by the legislature of Maine in March, 1836, and in April following an attempted organization was made in the city of Boston, where the number of shares was determined and the certificate issued; and the court, following the decision in *Miller v. Ewer*, held that the stock certificate which the plaintiff offered as proof of his right being evidenced by officers chosen in Boston, was invalid, because there can be no stock in a non-existent corporation, and that he could not be a stockholder under any attempted organization outside of the State granting the charter.

As we have said, these cases have been generally approved as expressing the correct rule of law on this subject, and we have found no subsequent case in which, upon the same or a similar state of facts, a different adjudication has been made. In *Keene and Brady, Trustees, et al. v. Van Reuth*, 48 Md. 184, no question as to the validity of corporate acts like those in the present case, done or attempted to be done by corporators out of the State granting the charter, arose or was decided. Courts have sometimes differed as to what are corporate acts, and what are acts merely of agents, the majority holding that the directors are merely agents, while some hold their acts as directors to be corporate acts, but the cases are uniform in holding that the charter can be accepted and the corporation organized only within the limits of the State creating it. Nor do we see any good reason why this rule should not be applied and enforced when a proper case for its application arises, in the tribunals of the State in which the unauthorized acts are done or the suit instituted, as well as by the courts of the incorporating State. The doctrine that a corporation must exist in the place of its creation and cannot migrate to another sovereignty, is so reasonable and just, and so firmly embedded in our jurisprudence, that courts ought to have no hesitation in enforcing it. But it would be of little practical utility if corporators under an act passed by one State can leave it and go to another, and there accept the charter, effect an organization, and thus bring the corporation into existence in a different sovereignty, and there proceed to act under it until restrained by a writ of *quo warranto*. Such acts are mere usurpations of power, mere attempts to exercise authority by persons destitute of it, and should, in our judgment, be declared inoperative and void, no matter what the consequences may be, whenever they are, as they have been in this case, clearly proved, and a court is asked to grant relief to a suitor whose right thereto is founded upon their assumed or supposed validity. There is no rule of comity which

requires one State to be made the birthplace of corporations chartered by another.

We are therefore of opinion that upon the facts appearing in this record, this supposed corporation had no existence at the time the appellant became the holder of what purported to be a certificate of its stock, and upon this ground alone we rest the affirmance of the decree dismissing his bill, without considering the other questions which have been argued with much ability by counsel for the appellant.

Decree affirmed.

CHARLES J. BONAPARTE v. THE BALTIMORE, HAMPDEN & LAKE ROLAND RAILROAD CO. AND OTHERS.

IN THE COURT OF APPEALS OF MARYLAND, FEBRUARY 17, 1892.

[Reported in 75 Maryland Reports 340.]

APPEAL from the Circuit Court for Baltimore County, in Equity.

The case is stated in the opinion of the court. A re-argument of the case "upon the question of the validity of the organization of the corporation under the charter of 1872, and the right to exercise the rights and franchises therein named," was ordered by the court.

The cause was argued before Alvey, C. J.; Robinson, Irving, Bryan, Fowler, and McSherry, JJ., and was re-argued before the full bench.

William Reynolds and *Charles J. Bonaparte*, with whom was *William S. Keech* on the brief, for the appellant.

Francis K. Carey and *Fielder C. Slingluff* for the appellees.

IRVING, J., delivered the opinion of the court.

By chapter 284 of the acts of the General Assembly of 1872 was passed the act entitled "An Act to incorporate the Baltimore, Hampden & Lake Roland Railroad Co." The first section of the act names certain persons as commissioners to take subscriptions to the capital stock of the company; and in case of the death, resignation, or refusal to serve of any of the persons named as commissioners, a majority of the remaining commissioners were given authority to appoint others. By the second section of the act the *subscribers to the stock*, and their successors and assigns, are declared incorporated into a company by the name of "Baltimore, Hampden & Lake Roland Railroad Co.," with perpetual succession under that name, with power of holding, purchasing, and encumbering property for the purposes of the corporation.

The third section makes the capital stock of the company to

consist of shares not exceeding two thousand in number, of the value of fifty dollars per share; five dollars of which was to be paid at the time of subscription, and the residue in such instalments as the president and directors should determine.

By the fourth section, as soon as five hundred shares should be subscribed, the commissioners to take the subscriptions were authorized, by publishing notice as prescribed, to call a meeting for the election of seven directors, who on being elected should elect a president, for whose qualification the fifth section provides.

The sixth section gives the company thus incorporated power to construct a railroad with one or two tracks and necessary sidings for the transportation of travellers or freight by horse power, and gives the company the *exclusive use* of any streets or county roads over which they may wish to lay their tracks between Boundary Avenue and Lake Roland, "provided said track or tracks are constructed in such manner as not to interfere with the travel on said streets or roads."

The seventh section provides for the condemnation of the right of way and estimating damages and benefits. The eighth section prescribes the rate of fare, not exceeding five cents per mile, or for the fraction of one.

The ninth section authorizes the borrowing of money to the extent of twenty-five thousand dollars; the tenth authorizes the making of by-laws, rules and regulations, and the appointment and employment of officers.

The eleventh section provides "that said company shall commence said railway within three years from the passage of this act, and complete the same in ten years." By the twelfth and last section the act is made to go into effect upon its passage, and the right to alter, amend, or repeal is reserved to the legislature.

The appellant is a property owner residing on Roland Avenue, which is opened as a public avenue or highway, of the width of sixty feet, past his property; and has filed his bill for an injunction restraining the appellees from the construction of their road which has been begun. He charges that the tearing up and obstruction of the avenue as is proposed is without lawful authority and will be an unlawful obstruction of the appellant in going to and from his premises. He avers that what is being done is not for the purpose of using horses for the road, but with the design of using electricity as a method of propulsion. He sets up in his bill and contends in argument, that it was not accepted in time to confer on the corporation the powers which are claimed for it; or to create a corporation at all.¹

¹Only so much of the opinion is given as relates to this question.—ED.

For the purpose of deciding this case we need not consider the question whether the act of Assembly, under which the appellee claims corporate powers, was constitutionally enacted. We may assume, without so deciding, that it was; for conceding that it was lawfully passed, we are of opinion that the appellee never acquired lawful corporate existence under it. If it did not acquire corporate life under that act, the injunction should have gone. The statute appointed commissioners to take subscriptions for the stock of the road it authorized to be built upon specified conditions and within certain limitations as to time. Those commissioners were not declared to be incorporated. They were the mere agents of the State to offer the charter to subscribers willing to accept it as offered. *State v. Bull*, 26 Conn. 179. Those who should become subscribers for stock of the corporation intended to be formed were by the second section of the act declared incorporated. The act went into effect on the day of its passage, and made a corporation possible, but the stock had to be taken as prescribed before there would be incorporators to accept the charter offered them. Subscribers to the extent of twenty-five thousand dollars, with five dollars per share actually paid in, were necessary to justify an organization as a corporation. Before there could be an acceptance of the charter and its conditions and limitations, subscribers to the extent mentioned were necessary. They were incorporated, and not the commissioners. The latter, being the State's agents to make the offer, could not accept it. They need not be stockholders, and might never be such; and until they should become subscribers for stock they could have no voice in the matter. Confessedly no stock subscriptions were made till September, 1891; which was more than nineteen years after the passage of the act tendering the charter upon the terms and limitations mentioned in it, and more than nine years after the time limited for completing the road. Construing the act, as is our first duty, we think it intended to offer the corporate existence and corporate powers mentioned in the act to such stock subscribers as could accept the offer on the conditions annexed. The commissioners named were charged with a specific duty. They could do nothing which the act did not authorize them to do. They could offer nothing to subscribers but what was given them to do; and it was their duty so to discharge their functions that the conditions of the offer might, by possibility, be complied with. Certain limitations were imposed in the act. The road was to be commenced within three years, and was to be completed within ten years, from the passage of the act.

The commissioners to take subscriptions must act therefore within such time that subscribers to the stock who were to be the

corporation, could accept the conditions annexed, and could make the effort, at least, to do what was authorized. When, therefore, the commissioners delayed action until the *limitations imposed* by the act had fully attached, and the time limited for beginning and finishing the road had long passed, it would seem to be clear that the powers of the State's agents were at an end; and their power must be enlarged by legislative action to justify their doing anything under the act. They had no right to offer to subscribers anything but the charter with its conditions; and when the conditions became impossible of compliance, before the State's agents offered it to anybody, it is clear that they were *functi officio*, and the act itself was no longer operative. It perished under its own limitations, and required legislative action again to vitalize it. The legislature was influenced by what was supposed to be the public interest, no doubt, at the time when the act was passed. Such a mode of conveyance for passengers and freight was deemed necessary for the public good at that time, and authority was given to form a corporation to meet the existing exigency. As was said in the case of the State v. Bull, 26 Conn. 179: "We cannot suppose it was creating a supernumerary charter, to be laid away among the State records to await convenience or necessity of future times." In the case of the State v. Bull the charter was not forfeited. That was not a case of forfeiture. The corporation was declared never to have come into legal existence; that the commissioners, acting as State's agents, had not acted within a reasonable time, and had surrendered their authority by their delay. They had once offered the charter for subscription of stock, and the requisite stock was not taken. Ten years afterward the commissioners again took subscriptions, and the amount of stock which the law had required should be taken before organization was taken, and the company proceeded to organize; but the court said the commissioners on the part of the State to take subscriptions had no longer any authority to act, and that the charter was therefore not accepted in time. It is true that this decision was made in a proceeding on the part of the State; but the grounds of the decision are such as show that like objections ought to be entertained at the suit of anybody injured by the doings of a corporation claiming existence through void proceedings.

The acceptance must not only be within reasonable time, but it must be *of that which is offered*. 1 Morawetz on Corporations, p. 22; State v. Bull, 26 Conn. 179; Hammond v. Straus, 50 Md. 12. In the last cited case this court said acceptance is essential to the existence of a corporation, and whether there was an acceptance was a question for a jury under the direction of the court as to what will amount to an acceptance—the case in which this court said

that was one at law, where the existence of the corporation was in issue. Here the case is in equity and the whole matter is for the court. The legal existence of a corporation is always open for inquiry. *Hammond v. Straus*, 50 Md. 12; *Smith v. Silver Valley Mining Co. et al.*, 64 Md. 85; *Lyons v. Orange, etc., Railroad Co.*, 32 Md. 18; *Agnew v. Bank of Gettysburg*, 2 H. & G. 493. Acceptance being essential, it becomes a *condition precedent* to corporate life. Whether that has been done within a reasonable time is a question of law for the court on the facts before it, for decision by the court, when arising in equity, or for instruction to a jury when the facts are to be found by it. *Loring v. City of Boston*, 7 Metc. (Mass.) 409; *Chicago & Great Eastern Railroad Co. v. Dane*, 43 N. Y. 240; *Mizell v. Bennett*, 4 Jones (N. C.) 429; *Hammond v. Straus*, 53 Md. 12. The time for finishing the road under the law expired in 1882, and no effort to get subscribers appears to have been made up to that time; or, if there was such effort, nothing was accomplished until September, 1891, when subscriptions were made and organization was effected. This was nearly ten years after the expiration of the ten years limited for completing the road. Was this an acceptance of the charter as offered? It is admitted that acceptance was necessary, but the appellee claims this was all the acceptance which was required. The terms of the offer could not then be accepted nor complied with. They were impossible. Being impossible of acceptance or of execution, counsel for the appellant most pertinently and forcibly suggests how such an acceptance differs from one made before any limitation had attached, and within undeniably reasonable time, but with express rejection of the time limit. If that had been done, with the *Lyons* and *Orange* railroad case already cited staring at them, it would not have been contended that it would have been a valid acceptance. If not, why should it be a valid one, when parties wait till it is unnecessary to make the exception in relation to the time limit, because that has, by the delay, been rendered an impossible condition? We can see no escape from the conclusion that there is no difference, and that counsel's question can only be so answered. But the appellees' counsel contend that this objection cannot, and no objection to the valid existence of this corporation can be made at this time, and in this way; and that it could only be made by the State on *scire facias* or by *quo warranto*. It is unquestionably the law that a forfeiture for non-user or misuser, or for non-compliance with any of the conditions of the charter, after the corporation has once been legally created and invested with franchises, can only be availed of and declared at the suit of the State. The case of *Canal Co. v. Railroad Co.*, 4 G. & J. 1, is undeniable authority for this statement of the

law, and we do not question it; but we do not think that case applies, nor do any that have followed its ruling apply to the case we consider. This case is not one where forfeiture is asked to be declared. It is a question of legal birth. If the corporation had been legally born its life could only be forfeited and its death declared at the instance of the State; but whether it ever did have life, or in other words ever was born, seems to us, upon both reason and authority, open to inquiry and contest at the instance of any one suffering from its unauthorized acts. If within a reasonable time after the passage of the law—for example, if before the time limit had attached in either of its aspects, the commissioners had taken enough subscriptions to enable the company to organize, and it had organized in acceptance of the charter, and then delays in the construction of the road had occurred, until it was impossible to comply with the requirements of the act respecting the completion of the road, then we do not think any one could complain but the State, for it could waive the conditions and limitations annexed to the charter. Had such a state of facts existed the Canal Case, 4 G. & J. 1, and the case of *Hodges et al. v. Balto. Passenger Railway Co. et al.* 58 Md. 620, and the other cases of like character cited by appellees, would have applied, and this appellant could not be sustained in his application for injunction because of such failure, and for the reason that the corporation was only and legally in existence before the default made; and the State only could complain and ask a forfeiture. This was so in the Canal Case. It had been fully invested with franchises, and made a corporation by the express language of the act of Assembly. In that case and the others relied on there was no question of legal existence in the start. In *Hammond v. Straus*, 53 Md., already cited, the incorporators were named, and declared a corporation; but it was held to be a legitimate inquiry whether the corporation had accepted the terms of a certain charter; and that inquiry was made in a case where the State was no party to the proceeding. A corporation as plaintiff asserting rights must establish its corporate existence to maintain its suit. That is the first step, if its existence be denied and put in issue. If it has committed a wrong and *justifies because* of corporate authority to do what is complained of, it must establish that authority. It will not do to say that because it claims to be a *de facto* corporation it must be assumed to be a legal corporation till the State claims it is not. The common right of men to protection in the enjoyment of their rights forbids such assumption. A corporation cannot gain right to recognition as such simply by claiming to be such and holding itself out as such. *Boyce v. Trustees, etc., of the M. E. Church*, 46 Md. 372; *Agnew v. Bank of Gettysburg*,

2 H. & G. 493. In the last cited case Archer, J., said: "Upon authority it is clear that the plaintiff, to maintain his case, must show that by law he has been effectually created a corporation." *Franklin Fire Insurance Co. v. Hart*, 31 Md. 59; *Lyons v. Orange, Alexandria & Manassas Railroad Co.*, 32 Md. 18; and *Smith v. The Silver Valley Mining Co. et al.* 64 Md. 85, established the same rule—namely, that whenever any act is essentially necessary to be done before a corporation can be regarded as *in esse*, that must be established or the corporation cannot be held to be a legal entity. *Fire Department of New York v. Kip*, 10 *Wendell*, 266.

The act of 1872, chapter 284, did not create a corporation *eo instanti*. It names as corporators future subscribers. It does use the term "hereby created," but that means that when there are subscribers, such as the act calls for, they are hereby declared a corporation. It provided for the formation of a corporation; but before there could be one *in esse* there must be the requisite subscribers to the stock. We have already said that such subscribers were not only necessary, but they must accept the charter as offered—that this became a condition precedent—that they must be legal subscribers capable of accepting, and must accept within a reasonable time. We have seen that, according to our construction of the statute, the powers of the commissioners, the State's agents, expired when they could no longer offer the charter, as framed by the legislature, and that their act in taking subscriptions was void; and if so it follows there were no legal subscribers. But if that were not so, these subscribers did not accept within a reasonable time. It is not necessary for us to establish and lay down what in any given case is reasonable time; but we may safely say that, when nothing is done toward an organization and acceptance by subscribers, such as these were, until the full lapse of time within which they were to complete the road contemplated by the legislature, that such acceptance was not within reasonable time. The offer was not accepted, for it could not be performed. It was impossible to do the thing which was required. We cannot say a corporation has been brought into legal existence which does not get some apparent existence till the thing it was to do cannot be done; or that, if it was intended as an acceptance, it was within reasonable time. The offer as made was not accepted. If it accepted at all, it accepted without limitation whatever as to time, as fully as if it had said, we refuse that condition. To allow the commissioners the right to take subscriptions for stock, and then to recognize such subscribers as competent to organize after such a lapse of time, when they could not execute the terms of the contract, would be violating the

principles, spirit, and terms of the act of Assembly. It would be allowing the commissioners to do what the legislature did not authorize them to do. It would be according to them the power to change the offer, which the legislature never designed. It would be allowing, practically, a fraud to be perpetrated on the State, the appellant, and all in *consimili casu*; as this court said would be the case against the corporation under the circumstances alleged in the bill in the case of Campbell and Voss *v.* Poultney *et al.* 6 G. & J. 94, if permitted, and where the court said a bill for injunction on the behalf of a stockholder was a proper remedy.

It was certainly not the intention of the legislature to allow the commissioners appointed under this statute to perpetuate their existence indefinitely by filling vacancies from time to time as mentioned in the act, so as to enable them, at any distant period, after the lapse of the time prescribed by the legislature for doing the work, until such time as they or their successors thought advisable, and then to bring by their act a corporation into existence, at will, which act of theirs nobody could gainsay but the State. If the State did not intend by this act to give such wonderful powers, then the attempted exercise of such powers was without warrant of law, and accomplished nothing—was void, and any one interested may contest it.

If *that* organization under that act cannot be questioned in this way at the instance of this appellant, then if the taking of subscriptions and organization had been delayed a hundred years, and then that was done which has now been done, nobody, no matter how much injured by its doing, could complain and be heard in the courts; and if the State did not interfere unexampled injury and loss might be wrought without redress. Although other agencies for meeting the public convenience might, in the meantime, have been devised, adopted, and introduced, if the position of the appellees be sound, a hundred years hence it would be possible for the stock to be taken, the charter to be accepted, and the work might proceed to the infinite damage of people who had a right to rely on the act of Assembly as dead. We cannot give our assent to any proposition involving such consequences. Even in the space of nineteen years, great changes will occur in the proximity of a great city. People had a right to assume that this project was abandoned. They had a right to suppose the authority to build the road no longer existed, and to improve, build, and act accordingly. They had a right to look to and rely on the limitations of the act of Assembly. For illustration, suppose, after the lapse of fifty or a hundred years, and the improvement of properties, as suggested, commissioners had taken the subscriptions, and the subscribers claiming corporate powers had organized and pro-

ceeded to exercise the powers of eminent domain given them in the seventh section of the act, and to condemn the right of way through such improved property. Can it be possible that under such state of facts the owners would not be allowed an application for injunction to question the rightful existence of such corporation? The mind instinctively shrinks from giving a negative answer. If, under such state of facts, the existence of the corporation could be questioned, and the owners could get relief, as, in our opinion, there can be no doubt, it must be competent in this case, and any similar case, to inquire into the question whether a corporation has ever had legal existence. We have already cited numerous authorities in support of this view, showing, as we think, this is the clearly accepted law in this State, and, as we understand it, the law in other States also.

After careful examination of the cases to which we have been cited and many more, we have been able to find no case, where the law is, as in Maryland, which really sustains the position of the appellees.

Reversed and remanded.

(*b*) *Under general laws.*

THE FRANKLIN BRIDGE CO., PLAINTIFFS IN ERROR. *v.*
YOUNG WOOD, DEFENDANT.

IN THE SUPREME COURT OF GEORGIA, AUGUST TERM, 1853.

[*Reported in 14 Georgia Reports 80.*]

ASSUMPSIT in Heard Superior Court. Tried before Hill, J., May Term, 1853.

The Franklin Bridge Co. was incorporated under the act of the legislature of 1843, to prescribe the mode of incorporating companies for certain purposes. by an order of the Inferior Court of Heard County.

The company sued the defendant, Wood, for his subscription to their stock.

The defendant pleaded that the company was not legally incorporated; contending that the act of the legislature, referred to, was unconstitutional and void.

Upon argument, the court held that the act aforesaid was unconstitutional, and non-suited the plaintiffs.

To this decision plaintiff excepted.

Mabry for plaintiff in error.

Featherston for defendant.

LUMPKIN, J., delivered the opinion.

Is the act of 1843, and that of 1845, amendatory thereof, pointing out the manner of creating certain corporations and defining their rights, privileges, and liabilities, unconstitutional?

By the first section of the act of 1843 it is provided "That when the persons interested shall desire to have any church, campground, manufacturing company, trading company, ice company, fire company, theatre company, or hotel company, bridge company, and ferry company, incorporated, they shall petition in writing the Superior or Inferior Court of the county where such association may have been formed, or may desire to transact business for that purpose, setting forth the object of their association, and the privilege they desire to exercise, together with the name and style by which they desire to be incorporated; and said court *shall pass a rule or order*, directing said petition to be entered of record on the minutes of said court."

Sec. 2 enacts "That when such rule or order is passed, and said petition is entered of record, the said companies or associations shall have power respectively, under and by the name designated in their petition, to have and use a common seal; to contract and be contracted with; to sue and be sued; to answer and be answered unto in any court of law or equity; to appoint such officers as they may deem necessary, and to make such rules and regulations as they may think proper for their own government, not contrary to the laws of this State; but shall make no contracts, or purchase or hold any property of any kind, except such as may be absolutely necessary to carry into effect the object of their incorporation. Nothing herein contained shall be so construed as to confer banking or insurance privileges on any company or association herein enumerated; and the individual members of such manufacturing, trading, theatre, ice, and hotel companies shall be bound for the punctual payment of all the contracts of said companies, as in case of partnership."

The third section declares that "No company or association shall be incorporated under this act for a longer period than fourteen years, but the same may be renewed whenever necessary, according to the provisions of the first section of this act."

The fourth section confers upon the Superior and Inferior Courts, respectively, the power to change the names of individuals.

Sec. 5. "For entering any of said petitions and orders, and furnishing a certified copy thereof, the clerk shall be entitled to a fee of five dollars; except in cases of applications by individuals for the change of names—in which case the clerk of said court shall be entitled to the fee of one dollar. And that such certified copy shall be evidence of the matters therein stated in any court of law and equity in this State." *Cobb's Digest*, 542, 543.

By the act of 1845, the provisions of the act of 1843 are extended to all associations and companies whatever, except banks and insurance companies, and the individual members of all such incorporations are made personally liable for all the contracts of said associations or companies. *Ibid.*

The argument against the validity of the charter of the Franklin Bridge Co., created under these statutes, is this:

1. That in England corporations are created and exist by prescription; by Royal Charter; and by Act of Parliament. With us, they are created by authority of the legislature, *and not otherwise*. That to establish a corporation is to enact a law; and that no power but the legislative body can do this.

2. That legislative power is vested, under our Constitution, in the General Assembly, to consist of a Senate and House of Representatives, to be elected at stated periods by the citizens of the respective counties.

3. And that the General Assembly is bound to exercise the power of making laws, thus conferred upon them by the people, in the primordial compact, in the mode therein prescribed, and in none other; and that a law made in any other mode is unconstitutional and void. That the legislature is but the agent of their constituents; and that they cannot transfer authority delegated to them to any other body, corporate or otherwise—not even to the judiciary, a co-ordinate department of the government, unless expressly empowered by the Constitution to do so. That to do this would be to violate one of the fundamental maxims of jurisprudence, as well as of political science—namely, *delegata potestas, non potest delegari*. That to do this would not only be to disregard the constitutional inhibition, which is binding upon the representative, but by shifting responsibility introduce innovations upon our system which would result in the overthrow and ultimate destruction of our political fabric.

The constitutional inquiry thus presented is an exceedingly grave one. It reaches far beyond the case made in the Bill of Exceptions, and extends to the whole range of topics which fall under legislative cognizance. In the view we take, however, of the statutes before us, no such proposition as that which has been discussed is presented for our adjudication. And we rejoice that it is so—not only on account of the delicacy of the task in pronouncing an act of the legislature unconstitutional and void; one which is never justifiable, unless the case is clear and free from doubt; and even then, one might almost be forgiven for shrinking from the performance of a duty which would be productive of such incalculable mischief and confusion. Bridges have been built at a heavy expense; manufacturing and innumerable other asso-

ciations have been formed in Georgia, and are in full operation under charters incorporated under this law. And in view of the consequences, any court might hesitate, unless the repugnance between the statute and the Constitution was so palpable as to admit of no doubt, and produce a settled conviction of their incompatibility with each other.

4. It was formerly asserted that in England the act of incorporation must be the *immediate* act of the King himself, and that he could not grant a license to another to create a corporation. 10 Reports, 27. But Messrs. Angell and Ames, in their treatise on Corporations, state that the law has since been settled to the contrary; and that the King may not only grant a license to a subject to erect a particular corporation, but give a general power, by charter, to erect corporations indefinitely, on the principle that *qui facit per alium, facit per se*; that the persons to whom the power is delegated of establishing corporations are only an instrument in the hands of the Government. 1 Kyd, 50; 1 Black. Comm. Ang. & Am. 63.

Before the Revolution charters of incorporation were granted by the proprietaries of Pennsylvania under a derivative authority from the Crown, and those charters have since been recognized as valid. 3 Wilson's Lectures, 409. A similar power has been delegated by the legislature of Pennsylvania with regard to churches. 7 S. & R. 517. The acts of the instrument in these cases become the acts of the mover under the familiar maxim above mentioned. See also 1 Missouri R. 5.

R | 5. Our opinion is that no legislative power is delegated to the courts by the acts under consideration. There is simply a ministerial act to be performed—no discretion is given to the courts. The duty of passing the rule or order directing the petition of the corporators to be entered of record on the minutes of the court, setting forth to the public the object of the association, and the privilege they desire to exercise, together with the name and style by which they are to be called and known, is made *obligatory* upon the courts, and should they refuse to discharge it a mandamus would lie to coerce them. It is true the legislature has seen fit to use the courts for the purpose of giving legal form to these companies. But it might have been done in any other way. Under the Free Banking Law of 1838, instead of petitioning the court, and having the order passed and entered upon its minutes, the certificate specifying the name of the association, its place of doing business, the amount of its capital stock, the names and residence of the shareholders, and the time for which the company was organized is required merely to be proven, and acknowledged, and recorded in the office of the Clerk of the Superior Court where

any office of the association is established, and a copy filed with the Comptroller General. *Cobb's Digest*, 107, 108.

And so under the act of 1847, authorizing the citizens of this State, and such others as they may associate with them, to prosecute the business of manufacturing, with corporate powers and privileges. The persons who propose to embark in that branch of business are required to draw up a declaration, specifying the objects of their association, and the particular branch of business they intend carrying on, together with the name by which they will be known as a corporation, and the amount of capital to be employed by them; which declaration is required to be first recorded in the clerk's office of the Superior Court of the county where such corporation is located, and published once a week for two months in the two nearest gazettes; which being done, it is declared that said association shall become a body corporate and politic, and known as such without being specially pleaded in all courts of law and equity in this State; to be governed by the provisions, and be subject to the liabilities therein specified. *Cobb's Digest*, 439, 440.

In these two instances, and others which might be cited, the legislature have dispensed with the action of the courts, or of any other agency to carry out their enactments, with regard to these various associations, which have become the usual and favorite mode of conducting the industrial pursuits of the civilized world in modern times.

All these statutes were complete as laws when they came from the hands of the legislature; and did not depend for their force and efficacy upon the action or will of any other power. It is true that they could only take effect upon the happening of some event, such as the filing the petition or declaration, and giving publicity to the purpose of the association in the mode prescribed by the act. But if this were a good reason for regarding these statutes as invalid, then how few corporations could abide the test. For it requires the *acceptance* of the charter to create a corporate body, for the government cannot compel persons to become an incorporated body without their consent. And this consent, either express or implied, is generally subsequent, in point of time, to the creation of the charter. And yet no charter that we are aware of has been adjudged invalid because the law creating it and previously defining its powers, rights, capacities, and liabilities did not take effect until the acceptance of the corporate body, or at least a majority of them, was signified.

The result, therefore, of our deliberation upon this case is, that the acts of 1843 and 1845, vesting in all associations, except for banking and insurance, the power of self-incorporation, do not impugn the Constitution, and that the charter of the Franklin

Bridge Co., and all others, created under them, and in conformity to their provisions, are legal and valid. With the policy of these statutes we have nothing to do. The province of this and all other courts is *jus dicere*, not *jus dare*.

Judgment reversed. ✓

THE PEOPLE ON THE RELATION OF EDWIN J. FRASER v.
J. M. SELFRIDGE *et al.*

IN THE SUPREME COURT OF CALIFORNIA, JULY TERM, 1877.

[Reported in 52 California Reports 331.]

APPEAL from the District Court, Fifteenth Judicial District, City and County of San Francisco.

On the 2d day of March, 1876, the defendants filed in the office of the Clerk of the City and County of San Francisco, articles of incorporation under the name of the "Pacific Homœopathic Medical Society of the State of California." On the next day, a certified copy of said articles was filed in the office of the Secretary of State, and the secretary issued to the defendants a certificate that a copy of the articles containing the required statement of facts had been filed in his office. Upon receipt of such certificate the defendants commenced acting as trustees of said corporation, and assumed to be a corporation.

The complaint contained a statement of the facts and a copy of the articles, and averred that the defendants had usurped the franchises of a corporation, and asked that they be excluded from such franchises. The answer did not deny the allegations of the complaint, but averred that a majority of the associates were present and voted. The plaintiff moved for judgment on the pleadings, and the court granted the motion. The defendants appealed. The other facts are stated in the opinion.

Jarboe & Harrison for the appellant.

Cowdery & Preston for respondents.

By the court:

- R / 1. The right to be a corporation is in itself a franchise; and to acquire a franchise under a general law, the prescribed statutory conditions must be complied with. The Civil Code (§ 594) requires that the articles of incorporation shall, among other matters, "*set forth . . . that a majority of the members of such association . . . voted at such election,*" etc. The certificate in this case altogether omits any statement in this respect, and is, therefore, insufficient to constitute the association a corporation. 233
2. The information avers that the claim of the defendants to be

a corporation is based upon the certificate just referred to, and sets out the certificate as constituting the title of the defendants—which, as we have seen, is insufficient.

3. The defect appearing upon the face of the certificate is not aided by the averment found in the answer, that in point of fact a majority of the members of the association did vote at the election mentioned in the certificate.

Judgment affirmed.

HECK AND PACE *v.* J. P. McEWEN *et al.*

IN THE SUPREME COURT OF TENNESSEE, SEPTEMBER TERM, 1883.

[*Reported in 12 Lea 97.*]

APPEAL from the Chancery Court at Knoxville. Staley, Ch.
Henderson & Jourolomon, T. S. Webb, and W. M. Baxter for complainants.

Andrews & Thornburg for defendants.

COOPER, J., delivered the opinion of the court.

The chancellor sustained a demurrer to this bill, and the referees have reported in favor of affirming his decree.

The bill was filed in March, 1882, to have declared void the charter of the Coal Creek Mining and Manufacturing Co., organized in March, 1872, under a decree or order of the Chancery Court by virtue of the act of 1871, c. 54. The complainants each own twenty-five shares of the capital stock of the company acquired by purchase, and the defendants own the residue of the stock, the entire capital stock being nominally \$2,500,000. The property of the company consists of mountain lands principally valuable for mining purposes.

Charles A. Bulkley, Wm. S. McEwen, and Henry H. Wiley were the owners of the lands mentioned under different and often conflicting titles. On December 25, 1871, they entered into an agreement in writing, by which they agreed to procure a charter of incorporation for mining and manufacturing purposes, and to convey to the company or corporation all the said lands to become the corporate stock, and to hold the stock as follows: Bulkley one-half and McEwen and Wiley each one-fourth. In pursuance of this agreement, they applied to the Chancery Court to be incorporated under the provisions of the act of the legislature of 1871, c. 54, and, on March 11, 1872, a decree or order was made by that court that they, their associates, successors and assigns, be incorporated by the name of "The Coal Creek Mining and Manufacturing Co.," with the right to sue and be sued, "and have

succession for a period of ninety-nine years from and after the first day of April, 1872, with power to purchase or lease personal and real estate, and hold and dispose of the same in the same way, and to mine for coal, iron, and other minerals, manufacture or vend the same, and to have and enjoy all the rights, privileges, and immunities, and be bound by all the restrictions, and subject to all the duties and liabilities prescribed in c. 2, art. 4, of the Code of Tennessee, from sec. 1474 to 1497, inclusive." In April, 1872, Bulkley, McEwen, and Wiley met and accepted said charter, and assumed to organize as a corporation thereunder by electing directors and officers, and adopting by-laws. The capital stock was fixed at \$2,500,000, and was issued to the three contracting parties in the proportion stipulated by their agreement. The complainants hold under these original incorporators, as do most of the defendants, Bulkley being the only survivor of the three, and he having parted with a portion of his stock to some of his co-defendants. The capital stock consists entirely of the lands conveyed to the company by the original corporators. The complainants purchased the stock owned by them in good faith, believing that the company was legally incorporated, and authorized to exercise the franchises and carry on the business assumed to be exercised and carried on by the company. The bill adds: "Your orators charge that, aside from electing officers, bringing suits in the corporate name, etc., the only power that has ever been exercised by said defendants and your orators, assuming to act as a corporation and from which revenues have been derived, is the power to lease real estate to others for mining upon a royalty in the way of rent." The bill assumes that the incorporation was void, and the stockholders partners under the firm name and style of the Coal Creek Mining and Manufacturing Co. The prayer is that the charter be declared void, the partnership dissolved, the business wound up and the partnership property sold, and proceeds of sale divided among the parties according to their respective interests.

The bill proceeds entirely upon the ground that the order of the Chancery Court and the subsequent organization of the corporation under it were void, and that the complainants and defendants were partners. In this view, the complainants and defendants would be partners in a stock company, each partner being interested in the property and the profits in the proportion of the stock owned by him, and liable individually for the debts of the partnership, if any creditor should resort in the first instance to his effects instead of the property of the firm. But the partners would be bound by the provisions of the decree of incorporation as the articles of partnership, and by the organization formed

and business conducted under it. There is no illegality in such a partnership nor in the business. The articles of partnership, in this view, stipulated for a continuance of the partnership for ninety-nine years from the date of organization. In the absence of any agreement for the continuance of a partnership for a definite period, any partner may, of course, put an end to it at any moment. But where the contract stipulates for a definite period, the parties and their privies are necessarily bound by it. No number of them less than a majority can call upon the courts to violate this contract except for some cause sufficient in law to justify the act. The utter inability of carrying on the business profitably upon the basis of the articles of agreement is a well-recognized ground for the dissolution of a partnership in advance of the time stipulated. *Waters v. Taylor*, 2 V. & B. 299; *Seighortner v. Weissenborn*, 5 C. E. Green, 177; *Brien v. Harriman*, 1 Tenn. Ch. 467. There may be other sufficient grounds for such a dissolution. The only ground alleged in the bill is that the complainants became the purchasers of their shares of the stock in good faith, believing that the company was legally incorporated. But the bill does not state that they were ignorant of the facts touching the organization of the company, and if they did know them, their ignorance was an ignorance of law, not fact. And if ignorant of the facts, their remedy would be against the parties under whom they claim, not against co-partners in no way implicated in misleading them. Ordinarily, the sale of an interest in a partnership would be itself a dissolution of the firm, but no such consequence can follow a sale of stock which the articles of partnership contemplate shall be sold. And persons who purchase such stock must be held bound by the terms of the association, and cannot be permitted to put an end to the business unless they can show a controlling equity. No such equity is disclosed by this bill.

By the act of 1871, the Chancery Court was authorized to organize corporations for the purpose of manufacturing and mining, to be regulated and controlled as prescribed by the Code, from sec. 1452 to 1466, inclusive, and with the general powers and privileges, and subject to the liabilities prescribed by the Code from sec. 1474 to 1497, inclusive. These latter sections contain general provisions in relation to all private corporations, while the former sections relate to the powers and liabilities of corporations created for the purpose of manufacturing, quarrying, and mining. In reference to this class of corporations the act of 1871 only changed the mode of their organization. Before that act, the corporation might be organized in the mode prescribed by the Code. After that act, the parties interested might organize the corporation under an order of the Chancery Court, upon petition. Which-

ever mode was adopted, the powers, duties, and liabilities of the corporation were precisely the same. The act was no doubt intended to go further, and to vest the Chancery Court with jurisdiction to create corporations. The act was held to be constitutional in so far as it undertook to empower the court to organize corporations for the purposes, and with the franchises granted by a general law. *Chadwell et al. ex parte*, 3 Baxt. 98; *Burns et al. ex parte*, 1 Tenn. Ch. 83. The Chancery Court did, therefore, have the power to organize corporations for the purpose of manufacturing and mining, and might organize the Coal Creek Co., in the mode pursued.

The Chancery Court, upon the petition of Bulkley, McEwen, and Wiley, did order, adjudge, and decree, that they, their associates, successors and assigns, be incorporated by the name of the Coal Creek Mining and Manufacturing Co. If it had stopped there the new corporation would have had the general powers of all private corporations prescribed by the Code, secs. 1474-1494, and the particular powers prescribed by secs. 1452-1466. For the court would have organized the corporation, and the statute law would have defined its attributes. The pre-existing mode of organizing corporations did not require anything more in the memorandum signed by the parties than the petition and order of court thereon would have shown. The action of the court could only effect, and be evidence of the organization, the powers and privileges being conferred by the general statutes. *Railroad v. Johnson*, 8 Baxt. 332. The order of the court undertook to go further, and does specify some of the powers and privileges of a corporation for mining and manufacturing, but not all, and does confer some powers not authorized by the general law. If the order of the court had been for the organization of a corporation for a purpose not provided for by a general law, the order and organization would have been void, as was held in *Chadwell's* case. The order in this case was for the organization of a corporation provided for by law, and was to that extent valid. The question raised by the bill is whether a valid organization is rendered invalid and void by the fact that the order does not recite or refer to all the provisions of the general law on the subject of the particular corporation, and does undertake to confer some powers not authorized by the general law.

The question is not free from difficulty. For, on the one hand, we may suppose the case suggested by counsel, where the order of the court attempted to confer various powers, none of which was authorized by statute, except the powers incident to all corporations by the common law, such as the power to sue and be sued, etc.; and, on the other hand, we might take the case where

in an order undertaking to recite the statutory privileges one of them is inadvertently omitted or changed in character by a clerical misprision. Extreme cases create exceptions, however, and do not form rules. The general rule must be that the organization of a corporation for a purpose provided for by law is good to the extent of the provisions of the law, neither vitiated by what may be treated as surplusage, nor by what it is beyond the power of the court to confer. And this for the reason that the corporators are bound to know the law, and to accept the organization subject to its limitations. It is not the organization, but the matter *ultra vires* of the incorporation that is void. A misuser of the corporate franchises may forfeit the charter upon proper proceedings, but will not avoid it *ab initio*. The bill, it is conceded, cannot be sustained unless the incorporation is void.

When the subject of the organization of corporations by the Chancery Court, under the act of 1871, came before me as chancellor, I held "that any charter granted by the Court of Chancery, if it had the power to create corporations, to any one set of individuals for a corporate purpose not conceded by a general law to all other citizens who might bring themselves within it, would be clearly unconstitutional and void." I was also of opinion, and so decided, that any organization of a corporation by the court for a purpose not conceded by a general law would be void. *Chadwell ex parte*, 1 Tenn. Ch. 95. These rulings were affirmed by this court. I was, moreover, so impressed with the danger of permitting parties to fix up a charter to suit themselves, and to cull out from the Code, and from former acts of incorporation, such rights and privileges as they might think would best suit their purpose, as was then being done in the Chancery Courts all over the State, that I was inclined to think that such charters, even for purposes conceded by a general law, would be void. I did not positively say so, but that was my opinion at the time, and the language used fairly admits of the construction. It was only a *dictum*, and the decisions of this court have not gone so far. The order of the court in *Railroad v. Johnson*, 8 Baxt. 332, upon an application to incorporate the petitioners for the purpose of building a railroad which was authorized by a general law, seems to have undertaken to set out the provisions of the charter, and probably, although the fact does not distinctly appear, contained some privileges not within the purview of the statute. *McFarland, J.*, in delivering the opinion of the court, said: "With regard to the so-called charter spread upon the record of the Chancery Court, we need only say, as we have in several recent cases, that the powers and privileges conferred are by virtue of the general statutes upon the subject, and that the action of

the court could only effect and be evidence of the organization." The question was distinctly raised in the unreported case of *E. T. Williams et al. v. The Duck River Valley & Narrow Gauge Railroad Co. et al.*, decided some years ago at Nashville. The railroad company in that case had been organized by an order of the Chancery Court with all the powers and privileges of two other railroad companies named, and with the rights, powers, etc., granted to railroad companies by the act of 1871, c. 54, and all amendments thereto. The bill was filed by taxpayers of Marshall County to enjoin the collection of a tax levied to pay the interest accruing on the bonds of the county issued to the Duck River Railroad Co. to aid in its construction. This court held that under the circumstances of the case the validity and regularity of the proceedings by which the company was organized could not be inquired into in the mode adopted. "But," said the court through Deaderick, Ch. J., "we are of opinion the charter is valid as to all the powers conferred by the act of 1871, and the amendments thereto, but not as to any powers attempted to be conferred which were included in the charters of the companies mentioned in the order of the Chancery Court." The inclination of the court has been to treat the order of organization for a corporate purpose provided for by a general law as valid to the extent of the powers conceded by the general law, and only invalid for any excess of powers or privileges beyond the provisions of the statute. And we now so hold in a case calling for a direct decision.

The report of the referees will therefore be confirmed, and the decree of the chancellor affirmed with costs.

(c) *By purchase or consolidation.*

CENTRAL RAILROAD & BANKING CO. v. GEORGIA.
IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER
TERM, 1875.

[Reported in 92 United States Reports 665.]

ERROR to the Supreme Court of the State of Georgia.

Jeremiah S. Black, David Dudley Field, and A. R. Lawton for the plaintiff in error.

N. J. Hammond, Attorney-General for the State of Georgia, and *Robert Toombs* for the defendant in error.

STRONG, J., delivered the opinion of the court.

By an act of the legislature of Georgia, enacted in 1833, a charter, unlimited in duration, was granted to "The Central Railroad & Canal Co. of Georgia," with power to make, construct, and

maintain a canal or railroad from the city of Savannah to the city of Macon. The seventh section was as follows :

" The said canal or railway, and the appurtenances of the same, shall not be subjected to be taxed higher than a half per cent. upon its annual net income."

In 1835, by an amendment to the charter, the name of the company was changed to " The Central Railroad & Banking Co. of Georgia ; " its capital stock was declared to consist of \$3,000,000 ; and the eighteenth section of the amendment enacted that " the said railroad, and the appurtenances of the same, shall not be subjected to be taxed higher than one-half of one per cent. upon its annual net income ; and no municipal or other corporation shall have the power to tax said company, but may tax any property, real or personal, of the said company, within the jurisdiction of said corporation, in the ratio of taxation of like property." Under this latter act the company was organized in 1836, and proceeded to build the railroad. By subsequent enactments, the capital stock was increased to \$5,000,000, and the company was authorized to build its road *into* Macon.

In 1847 the legislature of the State, by a statute approved December 27, 1847, incorporated " The Macon & Western Railroad Co.," with power to build a railroad from Macon to Atlanta. The charter contained no exemption from taxation, and affixed no limits to it. An amendment, however, was made to the charter by an act approved February 9, 1869, and assented to by the company, by which authority was given to increase the capital stock to \$2,500,000 ; and the chartered rights of the company were continued during the term of thirty years from its passage. The amending act contained the following proviso :

" *Provided, nevertheless,* that such additional stock as may be issued, as well as the present stock of said company, shall hereafter pay the same annual tax to the State as the other railroad companies of this State now do—namely, one-half of one per cent. on the amount of the net income."

Under this charter the railroad was constructed to Atlanta. Thus the western terminus of the Central Railroad & Banking Co. of Georgia, and the eastern terminus of the Macon & Western Railroad Co., were both fixed at Macon.

On the 24th day of August, 1872, the legislature passed an act authorizing the union and consolidation of the two railroad companies, under the name and charter of the first named, " The Central Railroad & Banking Co. of Georgia." As the true meaning and effect of this act is the basis of all the questions presented by the case, we quote the first section entire :

" Be it enacted by the General Assembly of the State of Georgia,

that the Macon & Western Railroad Co., and the Central Railroad & Banking Co. of Georgia, be, and they are hereby, authorized and empowered to unite and consolidate the stocks of the said two companies, and all the rights, privileges, immunities, property, and franchises belonging or attaching to said companies, under the name and charter of the said 'The Central Railroad & Banking Co. of Georgia,' in such manner that each and every owner and holder of shares of the capital stock of the Macon & Western Railroad Co. shall be entitled to and receive an equal number of shares of the capital stock of the consolidated companies. *Provided*, that nothing herein contained shall relieve or discharge either of said companies from any contract heretofore entered into, but that all such contracts shall be assumed by, and be binding on, the Central Railroad & Banking Co. of Georgia, and all benefits and rights under the same shall accrue to, and vest in, the said last-mentioned company. *And provided further*, that, upon such union and consolidation, the capital stock of the Central Railroad & Banking Co. of Georgia shall not exceed the amount of the authorized capital thereof, and the present authorized capital of the Macon & Western Railroad Co. added thereto."

The second section enacted, that the union and consolidation provided for should not take place until at least two-thirds of the stockholders of each company assented thereto.

By the third section it was enacted, that when it should be ascertained, in the manner provided, that the assent required in the second section had been given, it should be the duty of the board of directors of each company to complete said union and consolidation, and to certify the same under the corporate seals of said companies, to the Governor of the State, to be filed in the office of the Secretary of State.

The fourth section is as follows:

"Be it further enacted, that upon the union and consolidation herein provided for, each stockholder in the Macon & Western Railroad Co. shall be entitled to receive a certificate of stock as a shareholder in the Central Railroad & Banking Co. of Georgia for a like number of shares, upon the surrender of his certificate of stock in the former company, which new certificate shall entitle the holder thereof to the same rights, privileges, and benefits as attach to the holders of stock now held by the shareholders in said companies, or either of them."

Under the provisions of this act, and in the manner prescribed, the two companies united, the stock of the Central Co. being at the time \$5,000,000, and that of the Macon & Western being \$2,500,000.

Such was the legal *status* of the Central Railroad & Banking Co.

no official answer given

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on the 28th day of February, 1874, when the legislature passed an act entitled 'An Act to amend the tax-laws of the State so far as the same relate to railroad companies, and to define the liabilities of such companies to taxation, and to repeal so much of the charters of such companies, respectively, as may conflict with the provisions of this act.' The act required from each company an annual return to the comptroller-general of the value of its property, without deducting indebtedness, each class or species of property to be separately named and valued, to be taxed as other property of the people of the State. It also required the railroad companies to pay the taxes assessed upon them, and it repealed conflicting laws. Pursuant to this act of 1874, the comptroller-general assessed a tax of \$46,034.87 against the Central Railroad & Banking Co., and issued an execution to collect it. The company then paid the tax of one-half of one per cent. required by the prior law, and instituted proceedings in the mode provided by the statute to resist the exaction of the remainder of the tax assessed, on the ground that by its charter it was not subject to be taxed higher than one-half of one per cent. of its annual net income, and that the tax law of 1874 impaired the obligation of its contract with the State. Having failed in the State courts, the case has been brought here for review.

It is not denied that, by the provisions of the charter granted in 1833, amended in 1835, and accepted by the Central Railroad & Banking Co., a contract was made that the company should not be taxed higher than one-half of one per cent. upon its net income. Nor is it denied that the protection thus promised was as perpetual as the existence of the company itself. But it is contended on behalf of the State that the charter granted in 1833, and amended in 1835, was surrendered by the union and consolidation of the company under the act of 1872 with the Macon & Western Railroad Co.; that the company is now existing under a charter granted by the latter act, a charter which is subject to repeal or modification at the will of the legislature; and, therefore, that the act of 1874, which imposes a more onerous tax than one-half of one per cent. on the net income, is a violation of no contract, but that it is a legitimate exercise of legislative authority.

If it could be admitted, as contended by the State, that the charter granted in 1835 is no longer in existence, if in fact and in law it was surrendered in 1872, and if the "Central Railroad & Banking Co. of Georgia" is a new corporation, created when it united with the Macon & Western Railroad Co., the consequences claimed by the State might, and probably would, follow. The Code of Georgia, which went into operation January 1, 1863, has the following provisions:

Sec. 1682. "In all cases of private charters hereafter granted, the State reserves the right to withdraw the franchise, unless such right is expressly negated in the charter."

Sec. 1683. "Private corporations heretofore created, without the reservation of the right of dissolution, and where individual rights have become vested, are not subject to dissolution at the will of the State."

Chartered rights granted subsequent to the Code may, therefore, be withdrawn. It is equally certain that those granted before January 1, 1863, cannot be impaired by any legislative act.

Hence, it is of vital importance to this case to examine the effect of the union of the two companies, under what is called "the consolidation act of the legislature," of August 24, 1872. Did the act contemplate a surrender of its charter by the Central Railroad & Banking Co., and the grant to it of a new charter, or a re-grant of the old? It may be that the consolidation of two corporations, or amalgamation, as it is called in England, if full and complete, may work a dissolution of them both, and its effect may be the creation of a new corporation. Whether such be the effect or not must depend upon the statute under which the consolidation takes place, and of the intention therein manifested. If, in the statute, there be no words of grant of corporate powers, it is difficult to see how a new corporation is created. If it is, it must be by implication; and it is an unbending rule that a grant of corporate existence is never implied. In the construction of a statute, every presumption is against it.¹ We are not called upon, however, now to determine whether a consolidation, effected under a statute making no express grant of new corporate existence, may not, in some cases, work a dissolution of the existing corporations, and at the same time the creation of a new company; for, in the present case, we think the act of 1872 plainly contemplated no such thing. It is true, the act speaks of union and consolidation. It authorizes the two companies to unite and consolidate their stock, and all their rights, privileges, immunities, property, and franchises; but it prescribes the manner in which this may be done, and its effect. It is to be done under the name and charter of the Central Railroad & Banking Co.; that is, the union is to be under that charter, not under a new charter of a company bearing that name. The union is also to be in such a manner that every holder of the shares of the capital stock of the Macon & Western Railroad Co. shall be entitled to, and shall, on the surrender of their certificates, receive an equal number of shares of the capital stock as a

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¹A portion of the opinion containing a citation and discussion of cases has been omitted.—Ed.

shareholder in the Central Railroad & Banking Co. of Georgia, as declared in the fourth section. But there is no provision for a surrender of the certificates of stock of the shareholders of the Central, and none for the issue of other certificates to them. Their rights, whatever they may be after the union, are evidenced only by certificates of stock of the company chartered in 1835. If that charter has gone out of existence, they are stockholders in no company. Again, the act declared that all contracts of either of the companies should be assumed by and binding on the Central Railroad & Banking Co., and all benefits and rights under the same—that is, under the contracts—should vest in that company, not in a new corporation then springing into life. Nowhere in the act is there an intimation of any legislative purpose that the Central Railroad Co. should cease to exist. The Macon & Western Railroad Company was undoubtedly intended to go out of existence; for provision was made for the surrender of all the shares of its capital stock; and without stockholders it could not exist. The existence of such a provision in regard to the one company, and its absence in regard to the other, is a strong argument in support of the conclusion that it was not intended the Central Railroad & Banking Co. should surrender its charter, or dissolve. And still more, that company was authorized to increase its capital, plainly for the purpose of making room for the new shareholders entitled to come in by virtue of their ownership of shares of the dissolved company's stock. The language of this provision is significant. It is, that, upon the union and consolidation, the capital stock of the Central Railroad & Banking Co. "shall not exceed the amount of the authorized capital thereof, and the present authorized capital of the Macon & Western Railroad Co. added thereto." This refers plainly to the corporation which it was contemplated should exist after the union and consolidation of the two companies. What, then, was intended by the expression "authorized capital thereof;" that is, authorized capital of the Central Co.? Had this reference to a new company? Certainly not; for no new company had any authorized capital. It must have referred, therefore, to the old Central Railroad & Banking Co., in existence when the act was passed; and that was the company the amount of whose stock was to be limited after the union had taken place. That company was to continue in existence, and its capital was restricted to the amount of what had been previously authorized, augmented by a sum equal to the capital of the absorbed company. This view is confirmed by the language of a subsequent act of the legislature, enacted February 20, 1873, the preamble of which is, "Whereas, the recent union and consolidation of the Macon & Western Railroad

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Co. with the Central Railroad & Banking Co. of Georgia, under the name and charter of the latter company, has largely *increased* the capital stock, and the number of stockholders of the said last-named company." What company was it whose stock had been increased by the union? Plainly, one that was in existence before the union—the one under whose charter the companies had united. The stock of no new company had been increased. It is clear, therefore, that the legislature of 1873 did not understand that the old Central company had gone out of existence.

If, then, this construction of the act of August 24, 1872, be correct (and we cannot doubt that it is), that act contemplated and authorized no such union and consolidation of the two companies as should work a surrender of their charter by both of them, and the creation of a new company. At most, it intended a merger of the Macon & Western Railroad Co. into the other, a mode of transfer of that company's franchise and property, and a payment therefor with stock of the Central Co. It is of no importance to the inquiry whether a new corporation was created by the union and consolidation, that the Central acquired under the act new and enlarged powers as well as new stockholders. It was authorized to own and operate a railroad from Macon to Atlanta; to operate it as its own. It was also authorized to increase its capital stock. But the gift of new powers to a corporation has never been thought to destroy its identity, much less to change it into a new being. Such a gift is not a grant of corporate existence. It assumes corporate life already existing. Nor is it a necessary inference from the provision of the act of August 25, 1872, requiring the board of directors of each company to certify the union and consolidation to the Governor of the State, that the union was intended to be a surrender of the charter of both companies, and the acceptance of a new charter. There were sufficient reasons for that requirement, without the large inference attempted to be drawn from it. They were, that it might appear in the office of the Secretary of State that the Macon & Western Railroad Co. was no longer in existence, and that the capital stock of the Central Co. had been increased.

Our opinion, therefore, is, that the charter granted to the Central Railroad & Banking Co. of Georgia, by the act of 1835, was not surrendered by its action under the later act of 1872; that it still has all the rights that were originally conferred upon it, holding them under the charter originally granted to it; and, consequently, that it is not in the power of the legislature to impose upon it a greater tax than one-half of one per cent. of its net annual income.

It is still to be determined, however, whether the exemption

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from a higher tax applies to that portion of the company's property which was the road and franchise of the Macon & Western Railroad Co. before its merger into the Central Railroad & Banking Co. The Macon & Western never had any contract with the State limiting its liability to taxation. Its original charter said nothing upon the subject, and the amending act of February 9, 1869, gave it no exemption. It simply provided that the company should thereafter pay the same annual tax to the State as the other railroad companies then did; to wit, one-half of one per cent. on the amount of net income. It contained no negative words. It did not declare that higher taxation should not be imposed at any future time. At most, it raised only an implication that a higher tax would not be levied for the State. But it is a well-settled principle that a claim for exemption from taxation cannot be supported, unless the statute alleged to confer it is so plain as to leave no room for controversy. No presumption can be made in support of the exemption; and, if there be a reasonable doubt, it must be resolved in favor of the State. *Bailey v. Maguire*, 22 Wall. 215; *Delaware Railroad Tax*, 18 *id.* 206. In the latter of these cases, it was ruled that a provision in a charter, requiring a company to pay annually into the treasury of the State a tax of one-quarter of one per cent. upon its capital stock of \$400,000, did not prevent a subsequent legislature from imposing a further or different tax upon the company. To the same effect is *The Commonwealth v. The Easton Bank*, 10 Penn. St. 451.

If, then, there was nothing in the charter of the Macon & Western Railroad Co. by which its property was exempted from such taxation as the legislature might see fit to impose, did the union and consolidation with the Central Co. bring it within the exemption which the Central enjoyed? We think it did not. Nothing within the act of August 24, 1872, indicates that such was the intention of the legislature, and it is not a necessary result of the consolidation authorized. The obvious purpose of the act was to vest in the Central Co. the rights, privileges, immunities, property, and franchises which had belonged to the Macon & Western Co.; not to enlarge those rights, or to bestow new immunities. If, therefore, the Macon & Western held its franchises and property subject to taxation, the Central, succeeding to the franchises and property, holds them alike subject. It took them just as they were, acquiring no additional or enlarged rights as against the State. The case of *The Philadelphia & Wilmington Railroad Co. v. Maryland*, 10 How. 376, in its leading features is not unlike the one now before us. There, three railway companies were united and incorporated into one, in pursuance of

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statutory authority. One of the companies was by its charter partially exempted from taxation; and the law which authorized the union of the three companies declared that the new corporation should be entitled to all the powers and privileges and advantages belonging to the uniting companies. In construing this provision of the consolidating act, this court ruled, that as the constituent companies held their corporate privileges under different charters, the evident meaning of the provision was, that whatever privileges and advantages either of them possessed should in like manner be held and possessed by the new company, to the extent of the road they had respectively occupied before the union; that it should stand in their place, and possess the powers, rights, and privileges they had severally enjoyed in the portions of the road which had previously belonged to them, and be subject to the liabilities that rested upon them during their separate existence. A similar decision was made in *The Delaware Railroad Tax Case*, 18 Wall. 206. So in *Tomlinson v. Branch*, 15 *id.* 460, the same doctrine was maintained. Two railroad companies, the one exempt from taxation and the other not exempt, were authorized to unite, so that the latter should merge into the former; and the statute declared that thereafter all the rights, privileges, and property of the latter should be vested in the former, and that the former should be liable for all the debts and contracts of the latter. Under the statute, the union was consummated; and the question arose, whether the railroad property and works which had belonged to the company not exempt from taxation were exempt under the charter of the other after the union; and this court held that they were not. The case is hardly to be distinguished from the present, and it leads directly to the conclusion that the property and franchises formerly belonging to the Macon & Western Railroad Co. (now converted into \$2,500,000 of the stock of the Central Railroad & Banking Co.) has no well-founded claim to exemption from such taxation as it is now argued the legislature is forbidden by the Federal Constitution to impose. It is not protected by any contract with the State. That property, by the articles of union between the two companies, sanctioned by the legislature, amounts to one-third of the entire property of the company which survived the union, and to that extent, to that extent only, is it taxable at any greater rate than was stipulated in the charter of the Central Railroad & Banking Co. granted in 1835.

The judgment of the Supreme Court must, therefore, be reversed, and the record be remitted, with instructions to reverse the order of the Superior Court, and direct further proceedings in accordance with this opinion.

THE QUINCY RAILROAD BRIDGE CO *v.* THE COUNTY
OF ADAMS.

IN THE SUPREME COURT OF ILLINOIS, JANUARY TERM, 1878.

[*Reported in 88 Illinois Reports 615.*]

APPEAL from the Circuit Court of Adams County; Sibley, J., presiding.

Wheat, Ewing & Hamilton for the appellants.

Wheat & Marcy for the appellee.

BREESE, J., delivered the opinion of the court.

This was an action of debt, brought to the Adams Circuit Court, by the County of Adams, plaintiff, and against the Quincy Railroad Bridge Co., defendants, to recover a tax assessed against the capital stock of the bridge company for the year 1874, for county purposes.

The demurrer to the special pleas clearly presents this question, and it has been argued elaborately and ably by counsel: Are appellants a corporation so created under the laws of this State as to bring it under the operation of the fourth clause of sec. 1 of the Revenue Act of 1872?

The first section provides that the property named in this section shall be assessed and taxed, except so much as in this act may be exempted: First, all real and personal property in this State. Second, all moneys, credits, bonds, or stocks, etc. Third, the shares of capital stock of banks and banking companies doing business in this State. Fourth, the capital stock of companies and associations incorporated under the laws of this State. Rev. Stat. 1874, p. 857.

Appellants give the history of the creation of their company, by which it will be seen that by an act of the General Assembly of this State, approved February 10, 1853, and renewed by act of February 15, 1865, the Railroad Bridge Co. was incorporated. By an act of the legislature of the State of Missouri, date not given, the "Quincy Bridge Co." was incorporated, the object and purpose of both these incorporations being to construct and operate a railroad bridge across the Mississippi River at Quincy, in this State, such object not being attainable by either company separately or by virtue of the authority thus granted by either State, the river being a common boundary, and the territorial line of neither State extending beyond the main channel of the river. Appellants say, in order to render either of these charters available, it became necessary to consolidate the two companies, and to secure for the company thus consolidated the consent and approval of

each of said States, and the permission of the Government of the United States to throw a bridge across one of its navigable rivers.

On November 20, 1866, articles of agreement were entered into by these two companies thus incorporated, one by this State, the other by the State of Missouri, to consolidate, and such articles, duly filed and recorded in the office of the Secretary of State of this State, effected the consolidation of these two companies, and such consolidation was approved and legalized by the General Assembly of this State by an act, approved February 6, 1867, entitled "An Act to legalize the Quincy Railroad Bridge Co., and to facilitate and encourage the construction of a railroad bridge over the Mississippi River at Quincy." The first section of this act recognizes the consolidation of these two independent companies and their origin, and refers to the articles of consolidation on file in the office of the Secretary of State of this State, and the name and style of the Quincy Railroad Bridge Co. was bestowed upon it, and there was conferred upon it all the rights, powers, privileges and immunities which were granted to the railroad bridge company by the act incorporating the same in 1853, and renewed in 1865.

The consolidation of these companies is expressly recognized, and by the second section the company, as now existing, is fully recognized after the consolidation as a corporation. What is wanting to make appellants a corporation created by the laws of this State, we are unable to see.

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But it is said by appellants, this corporation, although it derived some of its powers and in part its corporate existence from this State, derived an equal part from the sovereign State of Missouri, and therefore they are not a corporation created under the laws of either State. To this it is answered, and we think satisfactorily, that the legislatures of this State and of Missouri cannot act jointly, nor can any legislation of the last-named State have the least effect in creating a corporation in this State. Hence, the corporate existence of appellants, considered as a corporation of this State, must spring from the legislation of this State, which, by its own vigor, performs the act. The States of Illinois and Missouri have no power to unite in passing any legislative act. It is impossible, in the very nature of their organizations, that they can do so. They cannot so fuse themselves into a single sovereignty, and as such create a body politic which shall be a corporation of the two States, without being a corporation of each State or of either State. As argued by appellee, the only possible *status* of a company acting under charters from two States is, that it is an association incorporated in and by each of the States, and when acting as a corporation in either of the States it acts under the

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authority of the charter of the State in which it is then acting, and that only, the legislation of the other State having no operation beyond its territorial limits. We do not, and cannot, understand that appellants derive any of its corporate powers from the legislature of the State of Missouri, but wholly and entirely derived from the General Assembly of this State. Consequently they are embraced in the first section of the Revenue Act, above cited.¹

There is no need to pursue this discussion farther. We hold appellant is a corporation created under the laws of this State, and its capital stock properly taxable, and properly assessed and taxed, and the judgment of the Circuit Court was right and must be affirmed.

Judgment affirmed.

RAILROAD CO. v. GEORGIA.

IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER
TERM, 1878.

[Reported in 98 *United States Reports* 359.]

ERROR to the Supreme Court of the State of Georgia.

This case came before the Superior Court for Fulton County, Georgia, on an "affidavit of illegality" filed by the Atlantic & Gulf Railroad Co. in regard to an execution for taxes which had been issued by the Comptroller-General of the State, in pursuance of an act of the General Assembly, approved February 28, 1874, entitled "An Act to amend the tax laws of this State, so far as the same relate to railroad companies, and to define the liabilities of such companies to taxation, and to repeal so much of the

¹ It is true that a corporation by the name and style of the plaintiffs appears to have been chartered by the States of Indiana and Ohio, clothed with the same capacities and powers, and intended to accomplish the same objects, and it is spoken of in the laws of the States as one corporate body, exercising the same powers and fulfilling the same duties in both States. Yet it has no legal existence in either State, except by the law of the State. And neither State could confer on it a corporate existence in the other, nor add to or diminish the powers to be there exercised. It may, indeed, be composed of and represent, under the corporate name, the same natural persons. But the legal entity or person, which exists by force of law, can have no existence beyond the limits of the State or sovereignty which brings it into life and endues it with its faculties and powers. The president and directors of the Ohio and Mississippi Railroad Company is, therefore, a distinct and separate corporate body in Indiana from the corporate body of the same name in Ohio, and they cannot be joined in a suit as one and the same plaintiff, nor maintain a suit in that character against a citizen of Ohio or Indiana in a Circuit Court of the United States. *Taney, C. J., Ohio & Miss. R. R. Co. v. Wheeler*, 1 Black, 286, 297, 298.—ED.

charters of such companies, respectively, as may conflict with the provisions of this act." The affidavit averred that the company, by the original charters granted to the Savannah, Albany & Gulf Railroad Co., and to the Atlantic & Gulf Railroad Co., or by the act consolidating them under the name of the last company, was not liable to be taxed more than one-half of one per cent. on its annual net income, and that said act of February 28, in so far as it authorized the levy and collection of a higher tax on its property, was in violation of the tenth section of the first article of the Constitution of the United States, and therefore void.

The court overruled the affidavit, and gave judgment "that the execution proceed." That judgment having been affirmed by the Supreme Court of the State, the company sued out this writ of error.

The remaining facts are stated in the opinion of the court.

Robert Falligant and *W. S. Chisholm* for the plaintiff in error.

Robert N. Ely, Attorney-General of Georgia, and *Robert Toombs* for the defendant in error.

STRONG, J., delivered the opinion of the court.

The single question presented in this case is whether the act of the legislature of Georgia, approved February 28, 1874, whereby it was enacted that the property of all railroad companies in the State should be taxed as other property of the people of the State, impairs the obligations of the contract contained in the charter of the plaintiff in error. The question compels consideration of the inquiry, what was the contract into which the State entered with the company, and what are the rights which the company holds under it?

Prior to the 18th day of April, 1863, there were two railroad companies in the State, one incorporated on the 25th day of December, 1847, as the "Savannah, Albany & Gulf Railroad," and the other incorporated on the 27th day of February, 1856, with the name, "The Atlantic & Gulf Railroad Co.," the same name now borne by the plaintiffs. The charter of each of these companies contained a grant of all the rights, privileges, and immunities which had been granted to, or were held and enjoyed by, any other incorporated railroad company or companies, or which had been granted to the Central Railroad & Banking Co., or to the Georgia Railroad Co., or to either of them. Both these latter companies had been incorporated prior to 1840, and each held by its charter the privilege or immunity of not being subject to be taxed higher than one-half of one per cent. upon its annual net income in the one case, and in the other, on the net proceeds of its investments. Consequently, the Savannah, Albany & Gulf Railroad Co., and the Atlantic & Gulf Railroad Co., sever-

ally acquired by their charters an exemption from taxation at any higher rate, or in any different manner. And such an immunity they severally continued to hold down to 1863. This, we think, admits of no reasonable doubt. If their rights are now the same as they were when the original charters of the two companies were first granted, it is quite clear the provisions of the taxing act of 1874 could not be applied to them without impairment of the contracts they had with the State. Neither of the companies, however, is now existing under or by virtue of its original charter. On the 18th day of April, 1863, the legislature of the State passed an act whereby they were empowered to consolidate their stocks upon such terms as might be agreed upon by the directors and ratified by a majority of the stockholders; and the act enacted, that when so consolidated they should be known as "The Atlantic & Gulf Railroad Co.," with a proviso that nothing therein contained should relieve or discharge either of them from any contract theretofore entered into by either, but that this company should be liable on the same. By the second section it was enacted that the stockholders of said consolidated railroad companies, by such corporate name, and in such corporate capacity, should be capable in law to have, purchase, and enjoy such real and personal estate, goods, and effects as might be necessary and proper to carry out the objects therein specified, and to secure the full enjoyment of all the rights therein and thereby granted, and by said name to sue and be sued, plead and be impleaded, in any court of competent jurisdiction; to have and use a common seal, and the same to alter at pleasure; to make and establish by-laws, and generally to exercise corporate powers.

The third section of the act declared that the several immunities, franchises, and privileges granted to the said Savannah, Albany & Gulf Railroad Co., and the Atlantic & Gulf Railroad Company, by their original charters and the amendments thereof, and the liabilities therein imposed, should continue in force, except so far as they might be inconsistent with the act of consolidation.

The fifth section repealed all laws and parts of laws militating against the act.

It is conceded that under this act a consolidation took place. It is, therefore, a vital question, What was its effect? Did the consolidated companies become a new corporation, holding its powers and privileges as such under the act of 1863?¹ Or was the consolidation a mere alliance between two pre-existing corporations, in which each preserved its identity and distinctive existence? Or, still further, was it an absorption of one by another, whereby the

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¹Only so much of the opinion is given as relates to this question.—Ed.

former was dissolved, while the latter continued to exist? The answer to these inquiries must be found in the intention of the legislature as expressed in the consolidating act. We think that intention was the creation of a new corporation out of the stockholders of the two previously existing companies. The consolidation provided for was clearly not a merger of one into the other, as was the case of Central Railroad & Banking Co. v. Georgia, 92 U. S. 665. Nor was it a mere alliance or confederation of the two. If it had been, each would have preserved its separate existence, as well as its corporate name. \ But the act authorized the consolidation of the stocks of the two companies, thus making one capital in place of two. / It contemplated, therefore, that the separate capital of each company should go out of existence as the capital of that company; and, if so, how could either have a continued separate being? True, the proviso to the first section declared that nothing therein contained should relieve or discharge either of the companies from any contract theretofore entered into by either, adding: "But this company [that is, the company created by the act] shall be liable on the same." It is thus distinguished between the two original companies and the one contemplated to be formed by their consolidation. And the proviso would have been quite unnecessary, had it not been thought by the legislature that the consolidation would work a dissolution of the amalgamated companies. Hence it was considered necessary to preserve the rights of parties who might have contracted with them. Only their contracts were mentioned in the proviso, and that in order to authorize a novation. The third section continued in force the several immunities, franchises, and privileges granted by the original charters and the amendments thereof, and the liabilities therein imposed, but plainly for the benefit of the consolidated companies. Why speak of original charters, if a later charter was not intended by the act? That such was the intention appears still more clearly in the third section. That conferred upon the consolidated stockholders complete corporate powers. It granted to them, when consolidated, not only a corporate name, but the right under that name to acquire and hold property, to sue and be sued, to have a common seal, to make by-laws, and generally to do everything that appertains to corporations of like character. This full grant of corporate power must have been intended for some purpose. What was it, if not to create a corporation? For that purpose it was amply sufficient. For any other it was unmeaning. If the two original companies were to continue in being, if it was not contemplated that they should be dissolved by consolidation, a new grant of corporate power and existence was unnecessary. They had it already.

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Looking thus at the legislative intent appearing in the consolidation act, we are constrained to the conclusion that a new corporation was created by the consolidation effected thereunder in the place and in lieu of the two companies previously existing, and that whatever franchises, immunities, or privileges it possesses, it holds them solely by virtue of the grant that act made. That generally the effect of consolidation, as distinguished from a union by merger of one company into another, is to work a dissolution of the companies consolidating, and to create a new corporation out of the elements of the former, is asserted in many cases, and it seems to be a necessary result. In *McMahan v. Morrison*, 16 Ind. 172, the effect of a consolidation was said to be "a dissolution of the corporations previously existing, and, at the same instant, the creation of a new corporation, with property, liabilities, and stockholders derived from those then passing out of existence." So in *Lauman v. The Lebanon Valley Railroad Co.*, 30 Pa. St. 42, the court said: "Consolidation is a surrender of the old charter by the companies, the acceptance thereof by the legislature, and the formation of a new company out of such portions of the old as enter into the new." This court, in *Clearwater v. Meredith*, 1 Wall. 40, expressed its approval of what was said in the former of these cases. It is true these expressions have not all the weight of authority, for they were not necessary to the decisions made, but they are worthy of consideration, and they are in accordance with what seems to be sound reason. When, as in this case, the stock of two companies is consolidated, the stockholders become partners, or *quasi* partners, in a new concern. Each set of stockholders is shorn of the power which, as a body, it had before. Its action is controlled by a power outside of itself. To illustrate: The stockholders of the Savannah & Albany Railroad Co. could not, after consolidation, have exercised any of the powers or franchises they had prior to their consolidation with the stockholders of the Atlantic & Gulf Railroad Company. They could not have built their road or controlled its management. They could not, therefore, have performed the duties which by their original charter were imposed upon them. Those duties could only have been performed by another organization, composed partly of themselves and partly of others. Their powers, their franchises, and their privileges were therefore gone, no longer capable of exercise or enjoyment. Gone where? Into the new organization, the consolidated company, which exists alone by virtue of the legislative grant, and which has all its powers, facilities, and privileges by virtue of the consolidation act. What, then, was left of the old companies? Apparently nothing. They must have passed out of existence, and the new company must

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have succeeded to their rights and duties. But the new company comes into existence under a fresh grant. Not only its being, but its powers, its franchises, and immunities, are grants of the legislature which gave it its existence.

If, then, the old Atlantic & Gulf Railroad Co. and the Savannah, Albany & Gulf Railroad Co. went out of existence when their stocks were consolidated under the act of the legislature of 1863, their powers, their rights, their franchises, privileges, and immunities ceased with them, and they have no existence except by virtue of the grant of corporate powers and privileges made by the consolidation act of 1863. That act created a new corporation, and endowed it with the several immunities, franchises, and privileges which had previously been granted to the two companies, but which they could no longer enjoy.

It necessarily follows that the new company held the rights granted to it under and subject to the law as it was when the new charter was granted.

Judgment affirmed.

MEMPHIS & LITTLE ROCK RAILROAD CO. v. RAILROAD COMMISSIONERS.

IN THE SUPREME COURT OF THE UNITED STATES, DECEMBER 22, 1884.

[Reported in 112 United States Reports 609.]

B. C. Brown for plaintiff in error.

U. M. Rose for defendants in error

MATTHEWS, J., delivered the opinion of the court. He recited the facts, and continued:¹

The case of the plaintiff in error rests entirely upon the words of the ninth section of the act of incorporation of the Memphis & Little Rock Railroad Co., of January 11, 1853, by which it was empowered to borrow money "on the credit of the company and on the mortgage of its charter and works." It is argued that these words confer power upon the company to convey to its bondholders, by way of mortgage and on foreclosure, to purchasers absolutely, all the property of the company, and all its franchises, including the franchise of becoming and being a corporation, in the sense of acquiring the right to organize as such under the act as successor to, and substitute for, the original company, precisely as if the act had named them as incorporators and endowed them with the corporate faculty. And this being

¹The statement of facts has been omitted.—Ed.

assumed, it is thence inferred that the exemption contained in sec. 28 of the act applies to the substituted corporation as though no change of corporate existence had taken place; and thus, it is insisted, the case is taken out of rule of decision established in *Morgan v. Louisiana*, 93 U. S. 217; *Wilson v. Gaines*, 103 U. S. 417, and *Louisville & Nashville Railroad Co. v. Palmes*, 109 U. S. 244. According to the principle of those decisions, the exemption from taxation must be construed to have been the personal privilege of the very corporation specifically referred to, and to have perished with that, unless the express and clear intention of the law requires the exemption to pass as a continuing franchise to a successor. This salutary rule of interpretation is founded upon an obvious public policy, which regards such exemptions as in derogation of the sovereign authority and of common right, and, therefore, not to be extended beyond the exact and express requirement of the grants, construed *strictissimi juris*.

It is not claimed that the assignment of the charter, by way of mortgage and subsequent judicial sale, constituted the purchasers to be the identical corporation that the mortgagor had been, for that would involve an assumption of its obligations and debts as well as an acquisition of its privileges and exemptions; but it is insisted that it resulted in another corporation in lieu of the original one, entitled to all the provisions of the charter, by relation to its date, as though it had been originally organized under it.

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But such a construction of the words authorizing a mortgage of the charter and works of the company is, in our opinion, beyond the intention of the law and altogether inadmissible.

There is no express grant of corporate existence to any new body. At the time when this charter was granted, in 1853, there was no general law in existence in Arkansas authorizing the formation of corporations. All such grants were by special act. Neither was there any law authorizing the purchasers of railroads at judicial sale under mortgages of the property and franchises of the company, to organize themselves into corporate bodies, such as was first passed in 1874. There is not in the act of January 11, 1853, for the incorporation of the Memphis & Little Rock Railroad Co., any reference to such a right, as vested in the mortgage bondholders or other purchasers at a sale under a foreclosure of the mortgage, nor is there any mode or machinery prescribed in the act for such an organization. The desired conclusion rests entirely on the inference deduced from the mortgage of the charter, and is an attempt to create a corporation by a judicial implication. But, as was said by this court in *Central Railroad & Banking Co. v. Georgia*, 92 U. S. 665, 670, "it is an unbending rule that a grant

of corporate existence is never implied. In the construction of a statute every presumption is against it."

The application of this rule is not avoided by the claim that the present is not the case of an original creation of a corporate body, but the transfer, by assignment, of a previously existing charter, and of the right to exist as a corporation under it. The difference is one of words merely. The franchise of becoming and being a corporation, in its nature, is incommunicable by the act of the parties and incapable of passing by assignment. "The franchise to be a corporation," said Hoar, J., in *Commonwealth v. Smith*, 10 Allen, 448, 455, "clearly cannot be transferred by any corporate body of its own will. Such a franchise is not, in its own nature, transmissible." In *Hall v. Sullivan Railroad Co.*, 21 Law Reporter, 138 (2 Redfield's Am. Railway Cases, 621; 1 Brunner's Collected Cases, 613), Curtis, J., said: "The franchise to be a corporation is, therefore, not a subject of sale and transfer, unless the law, by some positive provision, has made it so, and pointed out the modes in which such sale and transfer may be effected." No such positive provision is contained in the act under consideration, and no mode for effecting the organization of a series of corporations under it is pointed out, either in the act itself or in any other statute prior to that of December 9, 1874.

The franchise of being a corporation need not be implied as necessary to secure to the mortgage bondholders, or the purchasers at a foreclosure sale, the substantial rights intended to be secured. They acquire the ownership of the railroad, and the property incident to it, and the franchise of maintaining and operating it as such; and the corporate existence is not essential to its use and enjoyment. All the franchises necessary or important to the beneficial use of the railroad could as well be exercised by natural persons. The essential properties of corporate existence are quite distinct from the franchises of the corporation. The franchise of being a corporation belongs to the corporators, while the powers and privileges, vested in and to be exercised by the corporate body as such, are the franchises of the corporation. The latter has no power to dispose of the franchise of its members, which may survive in the mere fact of corporate existence, after the corporation has parted with all its property and all its franchises. If, in the present instance, we suppose that a mortgage and sale of the charter of the railroad company created a new corporation, what becomes of the old one? If it abides for the purpose of responding to obligations not satisfied by the sale, or of owning property not covered by the mortgage nor embraced in the sale, as it may well do, and as it must if such debts or property exists, then there will be two corporations co-existing under

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the same charter. For, "after an act of disposition which separates the franchise to maintain a railroad and make profit from its use, from the franchise of being a corporation, though a judgment of dissolution may be authorized, yet, until there be such judgment, the rights of the corporators and of third persons may require that the corporation be considered as still existing." *Coe v. Columbus, Piqua & Indiana Railroad Co.*, 10 Ohio St. 372, 386, per Gholson, J.

If, as required by the argument for the plaintiff in error, we regard and treat the franchise of being a corporation as an incorporeal hereditament, and an estate capable of passing between parties by deed, or of being charged by way of mortgage and of being sold under a power or by virtue of judicial process, the logical consequences will be found to involve insuperable difficulties and contradictions. In the present case, for example, after the execution of the first mortgage, we should have the railroad company continuing as a corporation *in esse*, and the trustees for the bondholders, or their beneficiaries, or assigns, a corporation *in posse*; and, after condition broken, the company would hold the title to its own existence as a mere equity of redemption. That equity it makes the subject of a second mortgage, and, in default, the beneficiaries under the power of sale became purchasers of the franchise, and organize themselves, by virtue of it, into the Memphis & Little Rock Railway Co. The latter can hardly claim the status of a corporation at law, as the legal title to the franchise of being a corporation had never passed to it, on the supposition that it might pass by a private grant; and, if a corporation at all, it could only be regarded as the creature of equity, according to the analogy of equitable estates, a nondescript class hitherto unknown in any system of law relating to the subject. It finally was displaced by the judicial sale, under which the plaintiff in error organized as successor to both. In the meantime, the original corporation has never been dissolved, and, for all purposes not covered by the mortgage, still maintains an existence as a corporate body, capable of contracting, and of suing and being sued. A conception which leads to such incongruities must be essentially erroneous.

If we concede to the argument for the plaintiff in error the position, that the language used, which authorizes the mortgage of the charter, may be taken in a literal sense, still the assignment would transfer it, in the very state in which it might be at the date of the transfer. But at that date the only corporation which the charter provided for had already been organized. The only powers conferred upon corporators to that end had already been exercised and exhausted. The bondholders under the mortgage,

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and their assignees, the purchasers at the sale, therefore took, and could take, nothing else than the charter, so far as it remained unexecuted, with such franchises and powers as were capable of future enjoyment and activity, and not such as, having already spent their force by having been fully exerted, could not be revived by a conveyance. This would include, by the necessity of the case, the franchise to organize a corporation, which can only be exerted once for all; for the simple act of organization exhausts the authority, and having once been effected, is legally incapable of repetition.

It is a mistake, however, to suppose that the mortgage and sale of a charter by a corporation, in any proper sense which can be legally imputed to the words, necessarily conveys every power and authority conferred by it, so far, at least, as to vest a title in them, as franchises, irrevocable by reason of the obligation of a contract. In many, if not in most, acts of incorporation, however special in their nature, there are various provisions which are matters of general law and not of contract, and are, therefore, subject to modification or repeal.

Such, in our opinion, would be the character of the right in the mortgage bondholders, or the purchasers at the sale under the mortgage, to organize as a corporation, after acquiring title to the mortgage property, by sale under the mortgage, if, in the charter under consideration, it had been conferred in express terms, and particular provision had been made as to the mode of procedure to effect the purpose. It would be matter of law and not of contract. At least, it would be construed as conferring only a right to organize as a corporation, according to such laws as might be in force at the time when the actual organization should take place, and subject to such limitations as they might impose. It cannot, we think, be admitted that a statutory provision for becoming a corporation *in futuro* can become a contract, in the sense of that clause of the Constitution of the United States which prohibits State legislation impairing its obligation, until it has become vested as a right by an actual organization under it; and then it takes effect as of that date, and subject to such laws as may then be in force. Such a contract, so far as it seems to assume that form, is a provision merely that, at the time, or on the happening of the event specified, the parties designated may become a corporation according to the laws that may then be actually in force. The stipulation, whatever be its form, must be construed as subject and subordinate to the paramount policy of the State, and to the sovereign prerogative of deciding, in the meantime, what shall constitute the essential characteristics of corporate existence. The State does not part with the franchise until it passes to the

organized corporation; and, when it is thus imparted, it must be what the government is then authorized to grant and does actually confer.

It is immaterial that the form of the transaction is that of a mortgage, sale, or other transfer *inter partes* of the franchise to be a corporation. "The real transaction, in all such cases of transfer, sale, or conveyance," as was said by the Supreme Court of Ohio in the case of *The State v. Sherman*, 22 Ohio St. 411, 428, "in legal effect, is nothing more or less, and nothing other, than a surrender or abandonment of the old charter by the corporators, and a grant *de novo* of a similar charter to the so-called transferees or purchasers. To look upon it in any other light, and to regard the transaction as a literal transfer or sale of the charter, is to be deceived, we think, by a mere figure or form of speech. The vital part of the transaction, and that without which it would be a nullity, is the law under which the transfer is made. The statute authorizing the transfer and declaring its effect, is the grant of a new charter couched in few words, and to take effect upon condition of the surrender or abandonment of the old charter; and the deed of transfer is to be regarded as mere evidence of the surrender or abandonment."

It is, of course, the law in force at the time the transaction is consummated and made effectual that must be looked to as determining its validity and effect. This is the principle on which this court proceeded in deciding the case of *Railroad Co. v. Georgia*, 98 U. S. 359. The franchise to be a corporation remained in, and was exercised by, the old corporation, notwithstanding the mortgage of its charter, until the new corporation was formed and organized; it was then surrendered to the State, and by a new grant then made passed to the corporators of the new corporation, and was held and exercised by them under the constitutional restrictions then existing.

Our conclusions, then, are, that the exemption from taxation contained in the 28th section of the act of January 11, 1853, was intended to apply only to the Memphis & Little Rock Railroad Co. as the original corporation organized under it; that it did not pass by the mortgage of its charter and works, as included in the transfer of the franchise to be a corporation, to the mortgagees or purchasers at the judicial sale; that the franchises embraced in that conveyance were limited to those which had been granted as appropriate to the construction, maintenance, operation, and use of the railroad as a public highway and the right to make profit therefrom; and that the appellant, not having become a corporate body until after the restrictions in the Constitution of 1874 took effect, was thereby incapable in law of having or

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enjoying the privilege of holding its property exempt from taxation.

The decree of the Supreme Court of Arkansas is accordingly affirmed.

NASHUA & LOWELL RAILROAD CORPORATION *v.*
BOSTON & LOWELL RAILROAD CORPORATION.

IN THE SUPREME COURT OF THE UNITED STATES, MAY 19, 1890.

[*Reported in 136 United States Reports 356.*]

E. J. Phelps and *Francis A. Brooks* for appellant in support of the jurisdiction, and on the merits.

J. H. Benton, Jr., on the merits, and in opposition to the jurisdiction.

FIELD, J., delivered the opinion of the court.

This is a suit in equity to compel the defendant, the Boston & Lowell Railroad Corporation, to account for various sums of money alleged to have been received by it and used for its benefit, to which the complainant was entitled, and also to charge the defendant Hosford personally with the amount diverted by him to that corporation. The controversy relates to certain transactions growing out of a joint traffic contract between the plaintiff and the defendant corporations.

Before passing, however, upon the validity of these claims a question raised as to the jurisdiction of the Circuit Court must be considered.¹ Its jurisdiction was assumed upon the diverse citizenship of the parties, and, upon the allegations of the bill, rightfully assumed. Although a corporation is not a citizen of a State within the meaning of many provisions of the national Constitution, it is settled that where rights of property or of action are sought to be enforced, it will be treated as a citizen of the State where created, within the clause extending the judicial power of the United States to controversies between citizens of different States. The plaintiff was created a corporation by the legislature of New Hampshire in June, 1835. It is therefore to be treated as a citizen of that State. *Railway Co. v. Whitton*, 13 Wall. 270, 283.

But it also appears that in April, 1836, the legislature of Massachusetts constituted the same persons a corporation of that State, who had been thus incorporated in New Hampshire, giving to them the same name and authorizing the new corporation to build

¹The statement of facts has been omitted, and only so much of the opinion is given as relates to this question.—ED.

that portion of the railroad between Nashua, in New Hampshire, and Lowell, in Massachusetts, lying within the latter State.

It also appears that in April, 1838, the legislature of Massachusetts passed an act to unite the two corporations—the one created by New Hampshire and the one created by Massachusetts—the first section of which was as follows:

“The stockholders of the Nashua & Lowell Railroad Corporation, incorporated by the legislature of the State of New Hampshire in the year one thousand eight hundred and thirty-five, are hereby constituted stockholders of the Nashua & Lowell Railroad Corporation, incorporated by the legislature of this Commonwealth in the year one thousand eight hundred and thirty-six; and the said two corporations are hereby united into one corporation by the name of the Nashua & Lowell Railroad Corporation; and all the tolls, franchises, rights, powers, privileges, and property granted, or to be granted, acquired, or to be acquired, under the authority of the said States, shall be held and enjoyed by all the said stockholders in proportion to their number of shares in either or both of said corporations.”

There were other provisions designed to enable the two corporations to conduct their business as one corporation. The act, however, declared that it should not take effect until the legislature of New Hampshire had passed a similar act uniting the said stockholders into one corporation, nor until the acts had been accepted by the stockholders at a meeting called for that purpose.

In June of the same year, 1838, the legislature of New Hampshire passed an act authorizing the two corporations to unite, and providing in such case that “all the tolls, franchises, rights, powers, privileges, and property” of the two corporations should be held and enjoyed by the stockholders in each and both in proportion to their number of shares therein, and that all property owned, acquired, or enjoyed by either of the corporations should be taken and accounted to be the joint property of the stockholders of the two corporations, and that the two corporations should be one—the act to be in force when accepted by the stockholders of the corporations at a meeting called for that purpose.

It does not appear, so far as disclosed by the record, except in the allegations of the defendant, that there was any formal acceptance of this act by the stockholders of the two corporations; but it would seem that the corporations acted upon its supposed acceptance, for the defendants pleaded to the jurisdiction of the court on the ground that, by the legislation mentioned, the complainant was not a corporation of New Hampshire, and consequently a citizen of that State, but was a corporation of Massachusetts, and thus a citizen of that State.

In the bill as originally filed, the Nashua corporation was the only complainant. By a subsequent amendment three persons, citizens of New Hampshire, stockholders of that corporation, were united as complainants. To the bill, as thus amended, the defendants pleaded as follows: "That this court ought not to take further cognizance of or sustain the said bill of complaint, because they say that they, the said defendants, at the time of filing said bill, were, and still are all, each and every one citizens of the State of Massachusetts, and that said plaintiffs, at the time of filing said bill, were not, and still are not all, each and every one citizens of another State, but that the said Nashua & Lowell Railroad Corporation, one of said plaintiffs, at the time of filing said bill, was, and still is, a corporation duly established and existing under and by virtue of the laws of the State of Massachusetts, and a citizen of said State of Massachusetts, and, at the time of filing said bill, was not, and still is not, a corporation established and existing by the laws of the State of New Hampshire, and a citizen of said State of New Hampshire. All of which matters and things these defendants do aver to be true, and are ready to verify. Wherefore they plead the same to the whole of said amended bill, and pray the judgment of this honorable court whether they should be compelled to make any other or further answer to said bill." This plea was argued upon an agreement as to the facts.

This plea was overruled, the court stating in its opinion that it seemed "that the defendant corporation might go into New Hampshire and there sue the plaintiff, as a New Hampshire corporation, in the Federal court, although it could not bring such suit in the district of Massachusetts against the New Hampshire corporation, because no service upon the New Hampshire corporation as such could be got in this district, if for no other reason," and adding that "if the defendant could sue the plaintiff in the Federal court for New Hampshire, notwithstanding the fact of the plaintiff being chartered under the laws of both States, there would seem to be no good reason why the plaintiff, claiming under its New Hampshire charter, should not be allowed to sue the defendant in the Federal court for Massachusetts, as it would be impossible for the defendant in such case to deny the title of the plaintiff as predicated upon the New Hampshire charter, or to deprive the plaintiff of the benefit of its New Hampshire citizenship thus acquired." 8 Fed. Rep. 458.

A more satisfactory answer would, perhaps, have been, that whatever effect may be attributed to the legislation of Massachusetts in creating a new corporation by the same name with that of the complainant, or in allowing a union of its business and property with that of the complainant, it did not change the ex-

istence of the complainant as a corporation of New Hampshire, nor its character as a citizen of that State, for the enforcement of its rights of action in the national courts against citizens of other States. Indeed, no other State could by its legislation change this character of that corporation, however great the rights and privileges bestowed upon it. The new corporation created by Massachusetts, though bearing the same name, composed of the same stockholders, and designed to accomplish the same purposes, is not the same corporation with the one in New Hampshire. Identity of name, powers, and purposes does not create an identity of origin or existence, any more than any other statutes, alike in language, passed by different legislative bodies, can properly be said to owe their existence to both. To each statute and to the corporation created by it there can be but one legislative paternity.

But on this point we will hereafter speak more at large. At present it is sufficient to say that the decision of the court overruling the plea in abatement upon the facts agreed upon disposed of the question of jurisdiction in the court below. It is true the defendants, in their answers, subsequently filed, also made the same objection. Formerly the objection to the jurisdiction, from a denial of the complainant's averment of citizenship, could only be raised by a plea in abatement or by demurrer, and not by answer. *De Sobry v. Nicholson*, 3 Wall. 420, 423; *Sheppard v. Graves*, 14 How. 504, 509; *Wickliffe v. Owings*, 17 How. 47. This rule is modified by the act of March 3, 1875, determining the jurisdiction of the Circuit Courts of the United States. 18 Stat. 472. That statute provides that if in any suit commenced in one of such courts "it shall appear to the satisfaction of said Circuit Court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said Circuit Court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this act, the said Circuit Court shall proceed no further therein, but shall dismiss the suit or remand it to the court from which it was removed, as justice may require, and shall make such order as to costs as shall be just."

By this statute the time at which such objection may be raised is not thus restricted, but it may be taken at any time after suit brought in the cases mentioned. The principal object of the statute was to relieve the national courts from the necessity of passing upon cases where it was plain that no question was involved within their jurisdiction, and thus free them from a consideration of controversies of a frivolous and questionable char-

acter, and to prevent fraudulent and collusive attempts to invoke the jurisdiction of those courts, as had frequently been the practice, by colorable transfers of property or choses in action from a citizen of one State to a citizen of another, to enable the latter to go into those courts, the original owner still retaining an interest in the property or choses in action transferred, or taking a contract for a retransfer of the same to himself after the termination of the litigation. In such cases it is undoubtedly the duty of the court below, of its own motion, to deny its jurisdiction, and of this court, on appeal or writ of error, to see that that jurisdiction has in no respect been thus imposed upon. *Morris v. Gilman*, 129 U. S. 315, 326; *Farmington v. Pillsbury*, 114 U. S. 138, 143.

If the question of jurisdiction could be raised in the answers of the defendants after the decision upon the issue on the plea in abatement, notwithstanding the decisions cited and the 39th Equity Rule of this court, the result in this case, though not perhaps in all cases, would be the same. Replications were duly filed to the answers, the effect of which was to deny the allegations respecting the acceptance of the acts having for their object the union of the two corporations, and those allegations were entirely unsupported by the evidence or by anything in the record; and neither in the final decree of the court, nor in its opinion, was any allusion made to the subject. The only evidence bearing upon the question is found in the legislation of the two States, New Hampshire and Massachusetts, and it is plain, as already stated, that no legislation of Massachusetts could possibly affect the existence of the complainant as a corporation of New Hampshire, or its character as a citizen of that State. The act of New Hampshire of 1838, while in terms authorizing the two corporations to unite, did not confer any new franchise or right upon either of them. All that it did was to permit the funding or conversion of the separate interests of each stockholder in each corporation, into a common or joint or undivided interest in both, and to declare that after the two corporations were united all property owned by either should be considered the joint property of the stockholders of both. There is nothing in these provisions looking to any abandonment of its corporate character as a creation of New Hampshire or its citizenship of that State.

There are many decisions both of the Federal and State courts which establish the rule that however closely two corporations of different States may unite their interests, and though even the stockholders of the one may become the stockholders of the other and their business be conducted by the same directors, the separate identity of each, as a corporation of the State by which it was created, and as a citizen of that State, is not thereby lost.

In *Farnum v. Blackstone Canal Co.*, 1 Sumner, 46, we have an instance of this kind. It there appeared that in January, 1823, the legislature of Massachusetts created a corporation by the name of the Blackstone Canal Co., for the purpose of constructing a certain canal in that State. It also appeared that in June of that year the legislature of Rhode Island incorporated a company by the same name, the Blackstone Canal Co., and authorized it to construct a certain canal within the limits of that State. In May, 1827, the legislature of Rhode Island declared that the stockholders of the Massachusetts company should be stockholders in the Rhode Island company as if they had originally subscribed thereto, if both corporations should agree thereto, and that the books and proceedings of the original and associated stockholders should be deemed the books of both. And the court held that, though the two corporations were created in adjacent States by the same name, to construct a canal in each of the States, respectively, and afterward by subsequent acts were permitted to unite their interests, their separate corporate existence was not merged, and that the legislature only created a unity of stock and interest. In giving its decision the court, by Story, J., said: "Although in virtue of these several acts, the corporations" (one of Rhode Island and one of Massachusetts) "acquired a unity of interests, it by no means follows that they ceased to exist as distinct and different corporations. Their powers, their rights, their privileges, their duties, remained distinct and several, as before, according to their respective acts of incorporation. Neither could exercise the rights, powers, or privileges conferred on the other. There was no corporate identity. Neither was merged in the other. If it were otherwise, which became merged? The acts of incorporation create no merger, and neither is pointed out as survivor or successor. We must treat the case, then, as one of distinct corporations, acting within the sphere of their respective charters for purposes of common interest, and not as a case where all the powers of both were concentrated in one. The union was of interests and stocks, and not a surrender of personal identity or corporate existence by either corporation."

In *Muller v. Dows*, 94 U. S. 444, 447, the bill averred that of the three complainants two were citizens and residents of the State of New York and one a citizen and resident of the State of Missouri. The two original defendants were corporations—namely, the Chicago & Southwestern Railway Co. and the Chicago, Rock Island & Pacific Railroad Co., and they were alleged to be citizens of the State of Iowa. It was contended that the Chicago & Southwestern Railway Co. could not claim to be a corporation created by the laws of Iowa, because it was formed by a

consolidation of the Iowa company with another of the same name chartered by the laws of Missouri, the consolidation having been allowed by the statutes of each State. Hence it was argued that the corporation was created by the laws of Iowa and of Missouri, and, as one of the plaintiffs was a citizen of Missouri, it was urged that the Circuit Court had no jurisdiction. But the court replied, speaking by Strong, J.: "We cannot assent to this inference. It is true the provisions of the statutes of Iowa, respecting railroad consolidation of roads within the State with others outside of the State, were that any railroad company organized under the laws of the State, or that might thus be organized, should have power to intersect, join, and unite their railroads constructed or to be constructed in the State, or in any adjoining State, at such point on the State line, or at any other point, as might be mutually agreed upon by said companies, and such railroads were authorized 'to merge and consolidate the stock of the respective companies, making one joint-stock company of the railroads thus connected.' The Missouri statutes contained similar provisions; and with these laws in force the consolidation of the Chicago & Southwestern Railways was effected. The two companies became one. But in the State of Iowa that one was an Iowa corporation, existing under the laws of that State alone. The laws of Missouri had no operation in Iowa."

The case of *The St. Louis, Alton & Terre Haute Railroad Co. v. The Indianapolis & St. Louis Railroad Co.*, which was before the Circuit Court of the United States for the District of Indiana, and is reported in 9 Bissell, 144, and which came before this court under the title of *The Pennsylvania Railroad Co. v. The St. Louis, Alton & Terre Haute Railroad Co.*, and is reported in 118 U. S. 290, bears a strong resemblance to the one now before the court. In the bill the plaintiff was alleged to be a corporation created under the laws of Illinois, and the defendants were alleged to be corporations created under the laws of Indiana and of Pennsylvania. To the bill a plea was interposed in which it was alleged that under various acts of the legislatures of Illinois and Indiana two corporations were created, one the plaintiff, *The St. Louis, Alton & Terre Haute Railroad Co.*, and the other the same company in name in Indiana; that they had been consolidated by those States, and were so inseparably connected together that the plaintiff was really a corporation as well of Indiana as of Illinois; and that, as some of the defendants were corporations of the State of Indiana the court could not take jurisdiction of the case. But the court held that the fact that the two corporations created by different States had been consolidated under the laws of those States, and that the railroad was operated by virtue of that consoli-

tion as one entire line of road, did not prevent one of those corporations from bringing suit in the Federal court as a corporation of the State where it was created, against the corporation with which it was consolidated, which was created by the other State. Said the court, speaking by Drummond, J.: "If the defendant corporation, though consolidated with another of a different State, can be sued in the Federal court in the State of its creation, as a citizen thereof" (referring to the cases of *Railway Co. v. Whittton*, 13 Wall. 270, and *Muller v. Dows*, 94 U. S. 444), "why can it not sue as a citizen of the State which created it? I can see no difference in principle. It seems to me that when the plaintiff comes into the Federal court, if a corporation of another State, it is clothed with all the attributes of citizenship which the laws of that State confer, and the shareholders of that corporation must be conclusively regarded as citizens of the State which creates the corporation, precisely the same as if it were a defendant. So I do not see why, if the plaintiff in this case alleges, as it does, that it is a corporation created by the laws of Illinois, it cannot institute a suit in the Circuit Court of the United States of Indiana against a corporation of that State."

The case turned upon the point whether the plaintiff corporation of Illinois had become also an Indiana corporation so as to lose its existence or identity and citizenship as an Illinois corporation. The court held in the negative, that it still remained an Illinois corporation, with all its rights of action as such in the United States courts.

When the case came to this court the decision of the court below was affirmed, but it would seem that when it was considered here the plea to the jurisdiction filed in the court below had been withdrawn. The question of jurisdiction was, however, examined by the court of its own motion. "It does not seem," said the court, "to admit of question that a corporation of one State owning property and doing business in another State by the permission of the latter, does not thereby become a citizen of this State also. And so a corporation of Illinois, authorized by its laws to build a railroad across the State from the Mississippi River to its eastern boundary may, by the permission of the State of Indiana, extend its road a few miles within the limits of the latter, or, indeed, through the entire State, and may use and operate the line as one road by the permission of the State, without thereby becoming a corporation or a citizen of the State of Indiana. Nor does it seem to us that an act of the legislature conferring upon this corporation of Illinois, by its Illinois corporate name, such powers to enable it to use and control that part of the road within the State of Indiana, as have been conferred upon it by the State which

created it, constitutes it a corporation of Indiana." Pp. 295, 296. And again: "In a case where the corporation already exists, even if adopted by the law of another State and invested with full corporate powers, it does not thereby become such new corporation of another State, until it does some act which signifies its acceptance of this legislation and its purpose to be governed by it. We think what has occurred between the State of Indiana and this Illinois corporation falls short of this." P. 296.

Many cases might be cited from the State courts illustrative and confirmatory of the doctrine of this case. In *Racine & Mississippi Railroad Co. v. Farmers' Loan & Trust Co.*, 49 Illinois, 331, it appeared that in April, 1852, the legislature of Wisconsin incorporated the Racine, Janesville & Mississippi Railroad Co., and that the legislature of Illinois, in February, 1853, incorporated the Rockton & Freeport Railroad Co., both companies authorized to construct railways; that in February, 1854, these two companies entered into an agreement to fully merge and consolidate their capital stock, powers, privileges, immunities, and franchises. In February, 1855, both the legislature of Illinois and the legislature of Wisconsin changed the name of these two companies to that of the Racine & Mississippi Railroad Co. It also appeared that in 1851 the Savannah Branch Railroad Co. was organized under the general railroad law of Illinois, and that in January, 1856, this company entered into articles of agreement with the Racine & Mississippi Railroad Co., by which its stock was consolidated with that of the latter company; that a majority in interest of the stockholders of the Savannah company ratified the articles; and that in 1857 the legislature of Illinois changed the name of that company to the Racine & Mississippi Railroad Co. Thus the names of three railroad companies, created by three different States, were changed to the same name, and were allowed to be consolidated together and act as one company. The Supreme Court of Illinois held that this consolidation did not convert them into one company in fact. Said the court: "Our view of the effect of the consolidation between the Rockton company (of Illinois) and the Wisconsin company, which we hold to have been legally made, is briefly this: While it created a community of stock and of interest between the two companies, it did not convert them into one company, in the same way and to the same degree that might follow a consolidation of two companies within the same State. Neither Illinois nor Wisconsin, in authorizing the consolidation, can have intended to abandon all jurisdiction over its own corporation created by itself. Indeed, neither State could take jurisdiction over the property or proceedings of the corporation beyond its own limits, and as is said by the court in *Ohio &*

Mississippi Railroad v. Wheeler, 1 Black, 286, 297, a corporation 'can have no existence beyond the limits of the State or sovereignty which brings it into life and endows it with its faculties and powers.' "

In Quincy Railroad Bridge Co. v. Adams Co., 88 Illinois, 615, 619, the plaintiff was a consolidated corporation, so called, created by the laws of Illinois and Missouri for bringing the Mississippi River between those States. The plaintiff, a bridge company, to avoid taxation in Illinois, claimed to be a corporation of both States, and not of either alone. The court in its opinion said: "It is said by appellants that this corporation, although it derived some of its powers, and in part its corporate existence, from this State (Illinois), derived an equal part from the sovereign State of Missouri, and, therefore, they are not a corporation created under the laws of either State. To this it is answered, and we think satisfactorily, that the legislatures of this State and of Missouri cannot act jointly, nor can any legislation of the last-named State have the least effect in creating a corporation in this State. Hence the corporate existence of appellants, considered as a corporation of this State, must spring from the legislation of the State which by its own vigor performs the act. The States of Illinois and Missouri have no power to unite in passing any legislative act. It is impossible, in the very nature of their organizations, that they can do so. They cannot so fuse themselves into a single sovereignty, and as such create a body politic which shall be a corporation of the two States without being a corporation of each State or of either State."

In Chicago & Northwestern Railroad v. The Auditor-General, 53 Michigan, 91, it appeared that the general railroad law of Michigan made roads that lie partly within and partly without the State, taxable on so much of their gross receipts as corresponded to the ratio of their local to their entire length. A local company was consolidated with a foreign one that controlled a number of other consolidated roads and several leased lines besides, and in considering the effect of the consolidation the court said, speaking by Cooley, Ch. J.: "It is familiar law that each corporation has its existence and domicil, so far as the term can be applicable to the artificial person, within the territory of the sovereign creating it; it comes into existence there by an exercise of sovereign will, and though it may be allowed to exercise corporate functions within another sovereignty, it is impossible to conceive of one joint act, performed simultaneously by two sovereign States, which shall bring a single corporation into being, except it be by compact or treaty. There may be separate consent given for the consolidation of corporations separately created; but when the two

unite they severally bring to the new entity the powers and privileges already possessed, and the consolidated company simply exercises in each jurisdiction the powers the corporation there chartered had possessed, and succeeds there to its privileges."

It would seem clear, from the decisions we have cited, as well as on general principles, that the plaintiff in this case must be considered simply in its character as a corporation created by the laws of New Hampshire, and as such a citizen of that State, and so entitled to go into the Circuit Court of the United States and bring its bill against a citizen of any other State; and that its union or consolidation with another corporation of the same name organized under the laws of Massachusetts, did not extinguish or modify its character as a citizen of New Hampshire, or give it any such additional citizenship in Massachusetts as to defeat its right to go into the Circuit Court of the United States in that district. R

If the position taken by the defendants could be maintained, then they could sue in the Federal court in New Hampshire the New Hampshire corporation, while that corporation could not enforce its claims in the Federal court in Massachusetts against the Massachusetts corporation. From the cases we have cited, it is evident that by the general law railroad corporations created by two or more States, though joined in their interests, in the operation of their roads, in the issue of their stock, and in the division of their profits, so as practically to be a single corporation, do not lose their identity; and that each one has its existence and its standing in the courts of the country only by virtue of the legislation of the State by which it is created. The union of name, of officers, of business and of property does not change their distinctive character as separate corporations. R

The decree of the court below will be reversed and the cause remanded for further proceedings in accordance with this opinion; and it is so ordered.

Fuller, Ch. J.; Gray and Lamar, JJ., dissented on the question of jurisdiction.

Blatchford, J., did not sit in this case, or take any part in its decision.

PEOPLE OF THE STATE OF NEW YORK, RESPONDENT, v.
THE NEW YORK, CHICAGO & ST. LOUIS RAIL-
ROAD CO., APPELLANT.

IN THE COURT OF APPEALS OF NEW YORK, JANUARY 20, 1892.

[*Reported in 129 New York Reports 474.*]

APPEAL from judgment of the General Term of the Supreme Court in the Third Judicial Department, entered upon an order made the first Tuesday of May, 1891, directing a judgment in favor of plaintiff upon a case submitted under secs. 1279-1281 of the Code of Civil Procedure.

The case was submitted to the General Term upon an agreed statement of facts substantially as follows:

The New York, Chicago & St. Louis Railroad Co. was organized under the general railroad laws of New York, June 16, 1887, with a capital stock of \$4,500,000. The railroad extended from Buffalo to the State line between New York and Pennsylvania. Before filing the certificate of incorporation with the Secretary of State, \$4625, being one-eighth of one per cent. upon the amount of capital stock, was paid to the State Treasurer, as required by sec. 1 of c. 143 of the Laws of 1886.

On the 15th day of August, 1887, an agreement for the consolidation of the above-named company with a company organized under the laws of Pennsylvania, owning a railroad extending from the westerly terminus of the above-named company's railroad to the westerly line of Pennsylvania, and having a capital stock of \$3,000,000, was filed with the Secretary of State. No tax was required to be paid before the agreement for consolidation was filed, and none was in fact paid. The agreement provided that the consolidated corporation should be called the New York, Chicago & St. Louis Railroad Co.

On the 27th day of September, 1887, an agreement for the consolidation of the last-named company with companies organized under the laws of Ohio and Indiana, owning railroads extending from the westerly line of the New York, Chicago & St. Louis Railroad Co.'s railroad to the westerly line of Indiana, and having together a capital stock of \$22,500,000, was filed with the Secretary of State. No tax was required to be paid before the agreement for consolidation was filed, and none was in fact paid. The agreement provided that the consolidated corporation should be called the New York, Chicago & St. Louis Railroad Co.

The capital stock of the first consolidated corporation was de-

clared to be \$7,500,000, which was the same as the aggregate capital of the New York and Pennsylvania corporations; and the capital stock of the second consolidated corporation—the defendant—was declared to be \$30,000,000, which was the same as the aggregate capital of the New York, Pennsylvania, Ohio, and Indiana companies.

The consolidation was effected, as far as the State of New York was concerned, under the provisions of c. 917 of the Laws of 1869.

The question now presented is whether the defendant must pay a tax of one-eighth of one per cent. upon the amounts mentioned in the agreements of consolidation as the capital stock of the consolidated companies; or, what is the same thing, upon the aggregate capital stock of the New York and Pennsylvania companies which entered into the first agreement, and of the New York, Pennsylvania, Ohio, and Indiana companies which entered into the second agreement.

Upon these facts judgment was rendered against the defendant for \$57,856.25, which is one-eighth of one per cent. upon the aggregate capital stock above mentioned; and it was also adjudged that defendant should be restrained from exercising any corporate powers until that amount should be paid.

Further facts are stated in the opinion.

Samuel E. Williamson for appellant.

Charles F. Tabor, Attorney-General, for respondent.

ANDREWS, J. This case depends upon the question whether the defendant is, within the meaning of c. 143 of the Laws of 1886, a corporation "incorporated by or under any general or special law of this State." The act of 1886 is entitled "An Act to tax stock corporations for the privilege of organization." The material part of the first section is as follows. "Sec. 1. Every corporation, joint-stock company, or association incorporated by or under any general or special law of this State, having capital stock divided into shares, shall pay to the State Treasurer, for the use of the State, a tax of one-eighth of one per cent. upon the amount of capital stock which said corporation, joint-stock company, or association is authorized to have, and a like tax upon any subsequent increase thereof. The said tax shall be due and payable upon the incorporation of said corporation, joint-stock company, or association, or upon the increase of the capital thereof, and no such corporation, joint-stock company, or association shall have or exercise any corporate powers until the said tax shall have been paid. And the Secretary of State and any county clerk shall not file any certificate of incorporation or articles of association, or certify or give any certificate to any such corporation, joint-stock com-

Tax

pany, or association until he is satisfied that the said tax has been paid to the State Treasurer."

The original corporation in this State, known as the New York, Chicago & St. Louis Railroad Co., organized in 1887, was a purely domestic corporation. It became a corporation by taking the proceedings and filing its articles of association prescribed by the General Railroad act of 1850. It paid the organization tax on its capital of \$4,500,000, and constructed its road from Buffalo to the Pennsylvania State line as authorized by its charter. In the same year it consolidated with the Erie & State Line Railroad Co., a Pennsylvania corporation having a capital of \$3,000,000. The consolidated company took the name of the New York corporation and its capital stock was the aggregate of the capital stock of the two constituent corporations—namely, \$7,500,000. Later in the same year (1887) the first consolidated company consolidated with certain railroad corporations then existing in Ohio and Indiana, having an aggregate capital of \$22,500,000. The company resulting from the second consolidation also took the name of the "New York, Chicago & St. Louis Railroad Co.," the aggregate capital of which was \$30,000,000, which was the sum of the combined capital of all the constituent companies. The several roads thus consolidated formed a continuous line of railroad extending from Buffalo in this State to Chicago in the State of Illinois.

The claim on the part of the people is that these consolidations having been effected under the authority of c. 917 of the Laws of 1869, entitled "An Act authorizing the consolidation of certain railroad companies," there was by force of said act a new incorporation created on each consolidation, and that the resulting company was a corporation "incorporated under a general or special law of this State," within c. 143 of the Laws of 1886, and, therefore, bound to pay the organization tax imposed by that act. The State, therefore, demands and has recovered the sum of \$57,856.25, which is one-eighth of one per cent. on \$7,500,000, the capital of the first consolidated company, and one-eighth of one per cent. on \$30,000,000, the capital of the second consolidated company, with interest added. By the judgment below the State of New York exacts a tax on the portion of the capital stock of the consolidated company contributed by the Pennsylvania, Ohio, and Indiana corporations, of about \$50,000, for the privilege of consolidation with the New York corporation. If this is required by the true construction of the act of 1886, the judgment must be affirmed, however unjust or impolitic the exaction may seem to be.

As a tax on property it would be clearly invalid, for as said by Cooley, J., in the case of *State Treasurer v. Auditor-General*, 46

Mich. 224, referring to a consolidated railroad from Buffalo to Chicago, which included a Michigan corporation, "the State can no more tax the whole capital which represents the track from Chicago to Buffalo, the rolling stock and other equipments, than it can tax the whole track and equipments." But the tax imposed by the act of 1886, being a tax on the privilege of consolidation, and not a property tax, the power of the State to subject corporations availing themselves of the act to any conditions the legislature may see fit to impose cannot be questioned.

We come, then, directly to the question whether the defendant is a corporation "incorporated by or under any general or special law of this State," within the meaning of the act of 1886. The only incorporating act of this State to which the incorporation of the defendant can be referred, is the Consolidation act of 1869. That act provides in great detail for the consolidation of railroad corporations "organized under the laws of this State, or of this State and any other State," operating a railroad either wholly within, or partly within and partly without the State, and forming a continuous or connected line of railway. The first section authorizes roads so situated to merge and consolidate their "capital stock, franchises, and property." The second section prescribes that the consolidation shall be effected by means of an agreement between the constituent companies, which shall prescribe the means and conditions of the consolidation, the name of the "new" corporation, the names of the first directors and officers, the number of shares of the capital stock and the amount and par value thereof, and the manner of converting the capital stock of the constituent companies into that of the new corporation, with a proviso that in no case shall the capital stock of the company formed by the consolidation exceed the aggregate sum of the capital stock of the companies so consolidated; and the section provides that the agreement of consolidation, when made and certified, shall be filed in the office of the Secretary of State. The third section declares that on perfecting and filing the agreement, the "parties hereto shall be deemed and taken to be one corporation by the name provided in said agreement, but that such act of consolidation shall not release such new corporation from any of the restrictions, disabilities, or duties of the several corporations so consolidated." The fourth section purports to vest in the "new corporation" the rights, privileges, and franchises, and all property, real and personal, debts and stock subscriptions of the corporations so consolidated. The fifth section continues the constituent companies in existence to preserve the rights and liens of creditors, and authorizes suits to be maintained against the new corporation in the courts of the State. The

sixth section prescribes that taxes on the capital stock of the "new corporation" shall be apportioned in the ratio that the number of miles of the railroad in this State bears to the number of miles without the State.

The act plainly regards a railroad formed by the consolidation of several roads as a new corporation. In the case of *People ex rel. Phonograph Co. v. Rice*, 11 N. Y. Sup. 249, affirmed in this court in 1891, there had been a consolidation of two domestic manufacturing companies organized under the laws of this State, under the Consolidation act, c. 960 of the Laws of 1867, applicable to such corporations, and it was held that a new corporation was created by the consolidation, and that it was liable to the organization tax under c. 143 of the Laws of 1886. This decision accords with the general current authority to the effect that statutes for the consolidation of domestic corporations are to be treated as acts of incorporation, and that on consolidation being effected under their provisions, the constituent companies, unless such an intention is excluded by the language of the statute, are deemed to be dissolved, and their powers and faculties to the extent authorized become vested in the consolidated company as a new corporation created by the act of consolidation. *State v. Maine Central Railroad Co.*, 66 Me. 488; *S. C.*, 96 U. S. 499; *Bishop v. Brainerd*, 28 Com. 289; *McMahan v. Morrison*, 16 Ind. 172; *Clearwater v. Meredith*, 1 Wall. 25; *Central Railroad & Banking Co. v. Georgia*, 92 U. S. 665; *Railroad Co. v. Georgia*, 98 U. S. 359.

These decisions are consistent with principle. The State has plenary power in the creation of domestic corporations, subject only to constitutional restraints. It may endow them with such power and faculties as it deems proper. It may control and regulate them, and they are, under powers now almost uniformly reserved, liable to have their charters altered, amended or repealed. It is perfectly competent for the legislature, in consolidation acts, to declare what shall be the status of the domestic corporations which shall avail themselves of their provisions, and also of the consolidated company. Whether the new consolidation shall create a mere business union between the constituent companies, leaving them in existence as corporations, or whether it shall operate as a surrender of the corporate franchises and an extinguishment of their corporate existence, and as creating a new corporation combining, to the extent permitted by the act, the powers of the corporations out of which it was formed, and vesting in it the property of the constituent companies, depends upon the legislative intention. Where under the act the result of the consolidation is a new corporation in place of two or more domes-

tic corporations, the resulting entity may properly be said to be a corporation "incorporated by or under a general or special law of this State," and, therefore, subject to the organization tax prescribed by c. 143 of the Laws of 1886.

But the constituent companies which were united to form "The New York, Chicago & St. Louis Railroad Co.," with the exception of the New York company of the same name, were not domestic corporations. Their corporate powers and life were derived from the legislatures of other States. They were and are in no respect subject to the laws of this State, but wholly and exclusively to the laws of their domicil. It was under those laws that the respective roads were constructed and operated. The laws of their jurisdictions fixed their capital, conferred and defined their franchises and powers; and their power to enter into any consolidation with other roads, either within or without the States which incorporated them, depended upon the affirmative grant of such power by the State creating them. The Consolidation act of 1869, it is true, assumes upon the consolidation not only of domestic corporations, but of corporations of different States, to transfer to and vest in the consolidated company formed under its provisions all the "rights, privileges, exemptions and franchises and property" of each of the constituent companies. But the legislature of this State was impotent alone to accomplish this result. It could not vest the franchises, rights, and property of the Pennsylvania, Ohio, and Indiana companies in the consolidated company, nor authorize any change or conversion of the stock of the constituent corporations into the stock of the consolidated company, nor confer any exclusive authority for their consolidation. All it had the power to do, and all that the act of 1869 in effect did do, was to authorize the New York corporation, upon like consent being given by Pennsylvania, Ohio, and Indiana, to merge the franchises, property, and interests of the several constituents into what would practically be one corporation. When this was sanctioned by the legislatures of the respective States, and the proper formal proceedings were taken, then, and not till then, could a new body be created. Whether the result would be a new corporation *de jure* is a mooted question. See *Mueller v. Dows*, 94 U. S. 444; *Shields v. Ohio*, 95 *id.* 319; *St. L., I., M. & S. R. Co. v. Berry*, 113 *id.* 465; *Nashua & L. R. R. Co. v. Boston & L. R. R. Co.*, 136 *id.* 356.

But assuming that result to follow, the new corporation would owe its existence not to the State of New York alone, but to the States of New York, Pennsylvania, Ohio, and Indiana. It would not be in any strict or even just sense a corporation "incorporated by or under any general or special law of this State," within

c. 143 of the Laws of 1886. The Consolidation act does, indeed, confer new corporate powers upon the New York corporation. Except for that act it could not have entered into the agreement of consolidation. So, also, it purports to grant corporate powers to the consolidated company. But it remains true, nevertheless, that concurrent legislation of the other States was essential to the completion of the consolidation, and it is to be inferred from the agreed statement that similar legislation to the act of 1869 was enacted in the several States.

We are of opinion that the proper and equitable construction of the act of 1886, imposing an organization tax on railroads "incorporated under the laws of New York," does not bring the defendant within its provisions. This conclusion has support in the cases of *State Treasurer v. Auditor-General*, 46 Mich. 224; *C. & N. W. Railway Co. v. Auditor-General*, 53 *id.* 79, and *O. & M. Railway Co. v. People*, 123 Ill. 467.

We desire to refer also to the dissenting opinion of Landon, J., in the court below.

The judgment of the General Term should be reversed and judgment ordered for the defendant on the case presented.

All concur.

Judgment reversed.

MERCANTILE BANK *v.* TENNESSEE.

IN THE SUPREME COURT OF THE UNITED STATES, MARCH 2, 1896.

[Reported in 161 *United States Reports* 161.]

T. B. Turley, with whom was *L. E. Wright* on the brief, for plaintiffs in error.

S. P. Walker, with whom was *C. W. Metcalf* and *F. T. Edmondson* on the brief, for defendant in error.

PECKHAM, J., after stating the case, delivered the opinion of the court.¹

By the original charter granted to the Gayoso Savings Institution in 1856, under which an organization was effected and the institution did business for many years, an exemption was granted to it similar to that granted in the case of the Bank of Commerce, just decided, *ante*, 134. That exemption was applicable to the shareholders upon their shares of stock, and did not apply to the capital stock of the institution. The shareholders in this case have been assessed at a greater rate than is permitted

¹The statement of facts has been omitted.—Ed.

by the third section of the charter in question, and the assessment would, therefore, be void if that section is applicable to this case.

The corporation plaintiff in error can make title to the charter in question only by virtue of the sale thereof under the decree in the suit of Lanier against the Gayoso Savings Institution, which was commenced in 1869. There is not a particle of evidence which in terms shows the transfer of the shares of stock in that institution owned by its shareholders at the time when the charter was sold, nor is there any evidence from which such transfer of stock by those shareholders to Taylor and his associates can properly be inferred; neither they nor their assignees of the charter can claim to be the same original corporation by reason of any previous purchase of specific shares held by the former shareholders. The record shows that the receiver was ordered "to sell at public auction to the highest bidder for cash the charter of the Gayoso Savings Institution, together with all the rights and privileges thereunder." It was the charter which the receiver assumed to sell and which alone he did sell, and not any specific shares of stock. The report of the receiver shows that under that order, which was made on the 11th of June, 1880, he advertised the charter of the Gayoso Savings Institution for sale on the 29th day of June, 1880, "together with all rights, privileges, and franchises thereunder," and that on the last-named day the charter was struck off and sold to Julius A. Taylor at and for the sum of \$201, "his being the highest, best, and last bid; that such bid was followed by paying to the receiver the amount of same in cash, which the receiver holds subject to the order of the court." On the 21st of July, 1880, the chancellor made a decree, in which it is stated that the cause "came on to be further heard on the report of sale by the receiver filed herein, which is in words and figures following: [Here insert report] and there being no exception to said report, the same is in all things confirmed, and the title to the charter of the Gayoso Savings Institution, with all the powers, privileges and franchises thereunto belonging, is hereby vested in J. A. Taylor, his heirs and assigns." This citation from the record is clear evidence of what the transaction purported to be. There is no mention or hint of any assignment or transfer of the shares of stock to the purchaser of the charter by the then owners of such shares, and it seems to be quite clear that none such was ever made. At any rate, there is not the slightest proof upon the subject showing affirmatively that it was made. At the time of the sale of the charter under the decree in the Lanier suit the Constitution of Tennessee had been adopted by the people in 1870, and since that time has been in full force and operation. That Constitution pro-

hibited exemptions from taxation, and provided that all property, real, personal, or mixed, should be taxed, excepting such as in explicit terms was exempt, stating what property might be and what should be exempt from taxation, and directing that all the rest shall be taxed.

We may inquire now what was the effect of the sale of the charter under the decree in the Lanier case? We have been referred to no statute authorizing the sale of charters of corporations circumstanced as the Gayoso Savings Institution was at the time of this sale, and it is questionable, to say the least, whether any title to the charter passed by the proceedings under the decree in the Lanier case. In order to show the existence of a contract of exemption, the corporation plaintiff in error must connect itself with and show that it or its shareholders are entitled to the benefit of the provision of exemption contained in the charter of 1856. Certainly no greater power was exercised by the Court of Chancery in decreeing the sale of the charter in the Lanier suit than would have been the case had a statute existed providing for the mortgaging of the charter, and its subsequent sale at foreclosure, on breach of condition named in the mortgage. Such a sale, it has been held, does not transfer to the purchaser the franchise to be a corporation, but only the right to reorganize as a corporation, subject to the laws, constitutional and otherwise, existing at the time of the reorganization. *Memphis & Little Rock Railroad v. Railroad Commissioners*, 112 U. S. 609. The franchise to be a corporation is distinguished from the franchise to exercise as a corporation the banking powers named in this charter. The exemption from taxation contained in the third section of the act of 1856 was a personal privilege in favor of the corporation therein specifically referred to, and it did not pass with the sale of that charter, and there is no express or clear intention of the law requiring that exemption to pass as a continuing franchise to the purchaser thereof. *Morgan v. Louisiana*, 93 U. S. 217; *Wilson v. Gaines*, 103 U. S. 417; *Louisville & Nashville Railroad Co. v. Palmes*, 109 U. S. 244. In the face of the constitutional provision prohibiting exemption, it can still less be claimed that the sale of the charter carried the exemption. All that Mr. Taylor and his associates could have acquired by the purchase of the charter, after the adoption of the Constitution of 1870, if they acquired anything, were the rights and privileges mentioned in the charter, and subject to the provisions of the Constitution and laws existing at the time of such purchase.

The meeting of Julius A. Taylor and his eight associates on the 5th of March, 1881, was nothing more than an attempt to reorganize by reason of the sale to Taylor under the decree in the

Lanier suit. Immediately prior to the organization of that meeting, Taylor and his associates had subscribed for and agreed to take stock in the Gayoso Savings Institution of Memphis, Tennessee, to the amount set opposite their respective names, and to pay the same in such manner as might be ordered by the board of directors, having that day paid in the sum of one dollar on each share. These subscribers for stock at once held a meeting, assuming to act as stockholders of the Gayoso Savings Institution, and attempting to reorganize that institution by virtue of the purchase of the original charter, and they assumed by these proceedings to become an organization and corporation known as the Gayoso Savings Institution. It is, at least, very doubtful whether they succeeded in this way in accomplishing that purpose. However that may be, they claimed to be and assumed to act as a corporation known by that name, and there was, so far as appears, no other corporation of that name and no other proceeding on the part of any one claiming to be that corporation or to have any rights therein. / Assuming to act as a corporation by the name of the Gayoso Savings Institution of Memphis, Tennessee, is by no means the same as being in fact the original corporation whose charter they purchased and whose corporate name they took. So far, by their action they had not become a corporation at all, but were simply assuming to be one. The legislature, however, passed an act on the 26th of March, 1881, changing the name of the Gayoso Savings Institution, which these stockholders claimed and assumed to be, to the name of the Mercantile Bank of Memphis, and thus recognized them as a corporation, and from that time the corporation continued regularly and without intermission until 1883, when Taylor and his associates transferred their stock, by regular and proper transfer of the certificates of stock, to John R. Godwin and his associates, who, since the 17th of April, 1883, have been doing a regular banking business under the charter down to the present time. They are the successors of the purchasers of the charter, and have been substantially recognized as a corporation by the legislature.

It may thus be that the corporation plaintiff in error is in fact organized and doing business under the general provisions of the charter of 1856 by virtue of the sale of the charter and the recognition of the legislature, and exercising the banking franchise and other rights granted therein to the original shareholders, but not as the identical corporation originally incorporated, and for that reason it is without the immunity from taxation contained in the third section of the charter. / There is nothing, therefore, legally inconsistent in treating the corporation of plaintiff in error as a corporation doing business by virtue of the charter of 1856, and

the legislative recognition accorded to Taylor and his associates in 1881, while at the same time the exemption contained in that same charter is held not to have passed by any of the proceedings above mentioned. This view of the case disposes of the objection taken by plaintiff in error to the position of the State as being inconsistent, in that it assumes by taxing the corporation plaintiff in error or its shareholders and by its bill of complaint in this suit to treat the former as a corporation, while at the same time denying it the exemption contained in the third section of the act of 1856. We agree that the bill of complaint and the supplemental bill in this suit both proceed upon an implication that the corporation plaintiff in error is actually a corporation under the provisions of the charter of 1856 alone, and that it has no other charter under which to justify its corporate existence than the one just named; but for the reasons already given, the attitude of the State is not inconsistent in treating the plaintiff in error as a corporation, and at the same time denying to it any title to the exemption claimed. The corporation may exist under and by virtue of the purchase of the charter at the receiver's sale, and the legislative recognition and the assumption of the State that it is a corporation, and yet not have the title to the exemption, because it is not in fact or in law the same corporation originally incorporated.

The judgment must be affirmed.

White, J., concurred in the result.

SECTION II.—LEGISLATIVE CONTROL.

(a) *Over domestic corporations.*

THE TRUSTEES OF DARTMOUTH COLLEGE v. WOODWARD.

IN THE SUPREME COURT OF THE UNITED STATES, FEBRUARY 2,
1819.

[*Reported in 4 Wheaton 518.*]

MARSHALL,¹ Ch. J., delivered the opinion of the court.

This is an action of trover brought by the trustees of Dartmouth College against William H. Woodward, in the State Court of New Hampshire, for the book of records, corporate seal, and

¹The statement of facts and the opinions of the associate justices have been omitted.—Ed.

other corporate property, to which the plaintiffs allege themselves to be entitled.

A special verdict, after setting out the rights of the parties, finds for the defendant, if certain acts of the legislature of New Hampshire, passed on the 27th of June and on the 18th of December, 1816, be valid and binding on the trustees without their assent, and not repugnant to the Constitution of the United States; otherwise, it finds for the plaintiffs.

The Superior Court of Judicature of New Hampshire rendered a judgment upon this verdict for the defendant, which judgment has been brought before this court by writ of error. The single question now to be considered is, do the acts to which the verdict refers violate the Constitution of the United States?

This court can be insensible neither to the magnitude nor delicacy of this question. The validity of a legislative act is to be examined; and the opinion of the highest law tribunal of a State is to be revised: an opinion which carries with it intrinsic evidence of the diligence, of the ability, and the integrity, with which it was formed. On more than one occasion this court has expressed the cautious circumspection with which it approaches the consideration of such questions, and has declared that in no doubtful case would it pronounce a legislative act to be contrary to the Constitution. But the American people have said, in the Constitution of the United States, that "no State shall pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts." In the same instrument they have also said "that the judicial power shall extend to all cases in law and equity arising under the Constitution." On the judges of this court, then, is imposed the high and solemn duty of protecting, from even legislative violation, those contracts which the Constitution of our country has placed beyond legislative control; and, however irksome the task may be, this is a duty from which we dare not shrink.

The title of the plaintiffs originates in a charter dated the 13th day of December, in the year 1769, incorporating twelve persons therein mentioned, by the name of "The Trustees of Dartmouth College," granting to them and their successors the usual corporate privileges and powers, and authorizing the trustees, who are to govern the college, to fill up all vacancies which may be created in their own body.

The defendant claims under three acts of the legislature of New Hampshire, the most material of which was passed on the 27th of June, 1816, and is entitled "An Act to amend the charter, and enlarge and improve the corporation of Dartmouth College." Among other alterations in the charter, this act increases the number of trustees to twenty-one, gives the appointment of the

act
amended
no to
trustees

additional members to the Executive of the State, and creates a board of overseers, with power to inspect and control the most important acts of the trustees. This board consists of twenty-five persons. The President of the Senate, the Speaker of the House of Representatives, of New Hampshire, and the Governor and Lieutenant-Governor of Vermont, for the time being, are to be members *ex officio*. The board is to be completed by the Governor and Council of New Hampshire, who are also empowered to fill all vacancies which may occur. The acts of the 18th and 26th of December are supplemental to that of the 27th of June, and are principally intended to carry that act into effect.

The majority of the trustees of the college have refused to accept this amended charter, and have brought this suit for the corporate property, which is in possession of a person holding by virtue of the acts which have been stated.

It can require no argument to prove that the circumstances of this case constitute a contract. An application is made to the Crown for a charter to incorporate a religious and literary institution. In the application it is stated that large contributions have been made for the object, which will be conferred on the corporation as soon as it shall be created. The charter is granted, and on its faith the property is conveyed. Surely in this transaction every ingredient of a complete and legitimate contract is to be found.

The points for consideration are:

1. Is this contract protected by the Constitution of the United States? *ye*

2. Is it impaired by the acts under which the defendant holds? *ye*

1. On the first point it has been argued that the word "contract," in its broadest sense, would comprehend the political relations between the Government and its citizens, would extend to offices held within a State for State purposes, and to many of those laws concerning civil institutions, which must change with circumstances, and be modified by ordinary legislation; which deeply concern the public, and which, to preserve good government, the public judgment must control. That even marriage is a contract, and its obligations are affected by the laws respecting divorces. That the clause in the Constitution, if construed in its greatest latitude, would prohibit these laws. Taken in its broad, unlimited sense, the clause would be an unprofitable and vexatious interference with the internal concerns of a State, would unnecessarily and unwisely embarrass its legislation, and render immutable those civil institutions which are established for purposes of internal government, and which, to subserve those purposes, ought to vary with varying circum-

stances. That as the framers of the Constitution could never have intended to insert in that instrument a provision so unnecessary, so mischievous, and so repugnant to its general spirit, the term "contract" must be understood in a more limited sense. That it must be understood as intended to guard against a power of at least doubtful utility, the abuse of which had been extensively felt; and to restrain the legislature in future from violating the right to property. That anterior to the formation of the Constitution, a course of legislation had prevailed in many, if not in all, of the States, which weakened the confidence of man in man, and embarrassed all transactions between individuals, by dispensing with a faithful performance of engagements. To correct this mischief, by restraining the power which produced it, the State legislatures were forbidden "to pass any law impairing the obligation of contracts," that is, of contracts respecting property, under which some individual could claim a right to something beneficial to himself; and that since the clause in the Constitution must in construction receive some limitation, it may be confined, and ought to be confined, to cases of this description; to cases within the mischief it was intended to remedy.

*limit
the
word
contract.*

The general correctness of these observations cannot be controverted. That the framers of the Constitution did not intend to restrain the States in the regulation of their civil institutions, adopted for internal government, and that the instrument they have given us is not to be so construed, may be admitted. The provision of the Constitution never has been understood to embrace other contracts than those which respect property, or some object of value, and confer rights which may be asserted in a court of justice. It never has been understood to restrict the general right of the legislature to legislate on the subject of divorces. Those acts enable some tribunal not to impair a marriage contract, but to liberate one of the parties, because it has been broken by the other. When any State legislature shall pass an act annulling all marriage contracts, or allowing either party to annul it without the consent of the other, it will be time enough to inquire whether such an act be constitutional.

*Did
not intend
to regulate
state in
civil law.*

The parties in this case differ less on general principles, less on the true construction of the Constitution in the abstract, than on the application of those principles to this case, and on the true construction of the charter of 1769. This is the point on which the cause essentially depends. If the act of incorporation be a grant of political power, if it create a civil institution to be employed in the administration of the Government, or if the funds of the college be public property, or if the State of New Hampshire, as a government, be alone interested in its transac-

*Is it
college a
public
institution?*

tions, the subject is one in which the legislature of the State may act according to its own judgment, unrestrained by any limitation of its power imposed by the Constitution of the United States.

But if this be a private eleemosynary institution, endowed with a capacity to take property for objects unconnected with government, whose funds are bestowed by individuals on the faith of the charter; if the donors have stipulated for the future disposition and management of those funds in the manner prescribed by themselves, there may be more difficulty in the case, although neither the persons who have made these stipulations, nor those for whose benefit they were made, should be parties to the cause. Those who are no longer interested in the property may yet retain such an interest in the preservation of their own arrangements as to have a right to insist that those arrangements shall be held sacred. Or, if they have themselves disappeared, it becomes a subject of serious and anxious inquiry, whether those whom they have legally empowered to represent them forever may not assert all the rights which they possessed while in being; whether, if they be without personal representatives who may feel injured by a violation of the compact, the trustees be not so completely their representatives in the eye of the law as to stand in their place, not only as respects the government of the college, but also as respects the maintenance of the college charter.

is it a private one.

It becomes then the duty of the court most seriously to examine this charter, and to ascertain its true character.

From the instrument itself, it appears that about the year 1754 the Rev. Eleazer Wheelock established at his own expense, and on his own estate, a charity school for the instruction of Indians in the Christian religion. The success of this institution inspired him with the design of soliciting contributions in England for carrying on and extending his undertaking. In this pious work he employed the Rev. Nathaniel Whitaker, who, by virtue of a power of attorney from Dr. Wheelock, appointed the Earl of Dartmouth and others trustees of the money which had been and should be contributed; which appointment Dr. Wheelock confirmed by a deed of trust authorizing the trustees to fix on a site for the college. They determined to establish the school on Connecticut River, in the western part of New Hampshire, that situation being supposed favorable for carrying on the original design among the Indians, and also for promoting learning among the English, and the proprietors in the neighborhood having made large offers of land, on condition that the college should there be placed. Dr. Wheelock then applied to the Crown for an act of incorporation, and represented the expediency of appointing those whom he had, by his last will, named as trustees in

America to be members of the proposed corporation. "In consideration of the premises," "for the education and instruction of the youth of the Indian tribes," etc., "and also of English youth, and any others," the charter was granted, and the trustees of Dartmouth College were by that name created a body corporate, with power, *for the use of the said college*, to acquire real and personal property, and to pay the president, tutors, and other officers of the college such salaries as they shall allow.

Power to
trustees

The charter proceeds to appoint Eleazer Wheelock, "the founder of said college," president thereof, with power by his last will to appoint a successor, who is to continue in office until disapproved by the trustees. In case of vacancy, the trustees may appoint a president, and in case of the ceasing of a president, the senior professor or tutor, *being one of the trustees*, shall exercise the office, until an appointment shall be made. The trustees have power to appoint and displace professors, tutors, and other officers, and to supply any vacancies which may be created in their own body by death, resignation, removal, or disability; and also to make orders, ordinances, and laws, for the government of the college, the same not being repugnant to the laws of Great Britain or of New Hampshire, and not excluding any person on account of his speculative sentiments in religion, or his being of a religious profession different from that of the trustees.

This charter was accepted, and the property, both real and personal, which had been contributed for the benefit of the college, was conveyed to and vested in the corporate body.

Funds
consisted
in
private
donations

From this brief review of the most essential parts of the charter it is apparent that the funds of the college consisted entirely of private donations. It is, perhaps, not very important who were the donors. The probability is that the Earl of Dartmouth and the other trustees in England were, in fact, the largest contributors. Yet the legal conclusion, from the facts recited in the charter, would probably be that Dr. Wheelock was the founder of the college.

Origin in
his
charity
school

The origin of the institution was, undoubtedly, the Indian charity school, established by Dr. Wheelock at his own expense. It was at his instance, and to enlarge this school, that contributions were solicited in England. The person soliciting these contributions was his agent; and the trustees, who received the money, were appointed by, and acted under, his authority. It is not too much to say that the funds were obtained by him, in trust, to be applied by him to the purposes of his enlarged school. The charter of incorporation was granted at his instance. The persons named by him in his last will as the trustees of his charity school compose a part of the corporation, and he is declared to be the

founder of the college and its president for life. Were the inquiry material, we should feel some hesitation in saying that Dr. Wheelock was not, in law, to be considered as the founder of this institution, and as possessing all the rights appertaining to that character. But be this as it may, Dartmouth College is really endowed by private individuals, who have bestowed their funds for the propagation of the Christian religion among the Indians, and for the promotion of piety and learning generally. From these funds the salaries of the tutors are drawn; and these salaries lessen the expense of education to the students. It is, then, an eleemosynary, and, as far as respects its funds, a private corporation.

Do its objects stamp on it a different character? Are the trustees and professors public officers, invested with any portion of political power, partaking in any degree in the administration of civil government, and performing duties which flow from the sovereign authority? *are the trustees public officers?*

That education is an object of national concern and a proper subject of legislation all admit. That there may be an institution founded by government, and placed entirely under its immediate control, the officers of which would be public officers, amenable exclusively to government, none will deny. But is Dartmouth College such an institution? Is education altogether in the hands of government? Does every teacher of youth become a public officer, and do donations for the purpose of education necessarily become public property so far that the will of the legislature, not the will of the donor, becomes the law of the donation? These questions are of serious moment to society, and deserve to be well considered.

Doctor Wheelock, as the keeper of his charity school, instructing the Indians in the art of reading, and in our holy religion; sustaining them at his own expense, and on the voluntary contributions of the charitable, could scarcely be considered as a public officer, exercising any portion of those duties which belong to government; nor could the legislature have supposed that his private funds, or those given by others, were subject to legislative management because they were applied to the purposes of education. When, afterward, his school was enlarged, and the liberal contributions made in England and in America enabled him to extend his cares to the education of the youth of his own country, no change was wrought in his own character or in the nature of his duties. Had he employed assistant tutors with the funds contributed by others, or had the trustees in England established a school with Dr. Wheelock at its head, and paid salaries to him and his assistants,

they would still have been private tutors; and the fact that they were employed in the education of youth could not have converted them into public officers, concerned in the administration of public duties, or have given the legislature a right to interfere in the management of the fund. The trustees, in whose care that fund was placed by the contributors, would have been permitted to execute their trust uncontrolled by legislative authority.

*Teachers
not
private.*

Whence, then, can be derived the idea that Dartmouth College has become a public institution, and its trustees public officers, exercising powers conferred by the public for public objects? Not from the source whence its funds were drawn, for its foundation is purely private and eleemosynary; not from the application of those funds, for money may be given for education, and the persons receiving it do not, by being employed in the education of youth, become members of the civil government. Is it from the act of incorporation? Let this subject be considered.

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A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence. These are such as are supposed best calculated to effect the object for which it was created. Among the most important are immortality, and, if the expression may be allowed, individuality—properties by which a perpetual succession of many persons are considered as the same, and may act as a single individual. They enable a corporation to manage its own affairs and to hold property without the perplexing intricacies, the hazardous and endless necessity, of perpetual conveyances for the purpose of transmitting it from hand to hand. It is chiefly for the purpose of clothing bodies of men, in succession, with these qualities and capacities that corporations were invented and are in use. By these means, a perpetual succession of individuals are capable of acting for the promotion of the particular object like one immortal being. But this being does not share in the civil government of the country, unless that be the purpose for which it was created. Its immortality no more confers on it political power or a political character than immortality would confer such power or character on a natural person. It is no more a State instrument than a natural person exercising the same powers would be. If, then, a natural person employed by individuals in the education of youth, or for the government of a seminary in which youth is educated, would not become a public officer, or be considered as a member of the civil government, how is it that this artificial being, created by law for the purpose of being employed by the same individuals for the same purposes, should become a part of

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the civil government of the country? Is it because its existence, its capacities, its powers, are given by law? Because the Government has given it the power to take and to hold property in a particular form and for particular purposes, has the Government a consequent right substantially to change that form or to vary the purposes to which the property is to be applied? This principle has never been asserted or recognized, and is supported by no authority. Can it derive aid from reason?

The objects for which a corporation is created are universally such as the Government wishes to promote. They are deemed beneficial to the country; and this benefit constitutes the consideration, and, in most cases, the sole consideration of the grant. In most eleemosynary institutions the object would be difficult, perhaps unattainable, without the aid of a charter of incorporation. Charitable or public-spirited individuals desirous of making permanent appropriations for charitable or other useful purposes find it impossible to effect their design securely and certainly without an incorporating act. They apply to the Government, state their beneficent object, and offer to advance the money necessary for its accomplishment, provided the Government will confer on the instrument which is to execute their designs the capacity to execute them. The proposition is considered and approved. *consideration for giving the benefit* The benefit to the public is considered as an ample compensation for the faculty it confers, and the corporation is created. If the advantages to the public constitute a full compensation for the faculty it gives, there can be no reason for exacting a further compensation by claiming a right to exercise over this artificial being a power which changes its nature and touches the fund for the security and application of which it was created. There can be no reason for implying in a charter, given for a valuable consideration, a power which is not only not expressed, but is in direct contradiction to its express stipulations.

From the fact, then, that a charter of incorporation has been granted nothing can be inferred which changes the character of the institution or transfers to the Government any new power over it. The character of civil institutions does not grow out of their incorporation, but out of the manner in which they are formed and the objects for which they are created. The right to change them is not founded on their being incorporated, but on their being the instruments of government, created for its purposes. The same institutions, created for the same objects, though not incorporated, would be public institutions, and, of course, be controllable by the legislature. The incorporating act neither gives nor prevents this control. Neither, in reason, can the in-

corporating act change the character of a private eleemosynary institution.

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We are next led to the inquiry, for whose benefit the property given to Dartmouth College was secured? The counsel for the defendant have insisted that the beneficial interest is in the people of New Hampshire. The charter, after reciting the preliminary measures which had been taken, and the application for an act of incorporation, proceeds thus: "Know ye, therefore, that we, considering the premises, and being willing to encourage the laudable and charitable design of spreading Christian knowledge among the savages of our American wilderness, and, also, that the best means of education be established in our province of New Hampshire, for the benefit of said province do, of our special grace," etc. Do these expressions bestow on New Hampshire any exclusive right to the property of the college, any exclusive interest in the labors of the professors? Or do they merely indicate a willingness that New Hampshire should enjoy those advantages which result to all from the establishment of a seminary of learning in the neighborhood? On this point we think it impossible to entertain a serious doubt. The words themselves, unexplained by the context, indicate that the "benefit intended for the province" is that which is derived from "establishing the best means of education therein;" that is, from establishing in the province Dartmouth College as constituted by the charter. But if these words, considered alone, could admit of doubt, that doubt is completely removed by an inspection of the entire instrument.

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donations*

The particular interests of New Hampshire never entered into the minds of the donors, never constituted a motive for their donation. The propagation of the Christian religion among the savages, and the dissemination of useful knowledge among the youth of the country, were the avowed and the sole objects of their contributions. In these New Hampshire would participate, but nothing particular or exclusive was intended for her. Even the site of the college was selected, not for the sake of New Hampshire, but because it was "most subservient to the great ends in view," and because liberal donations of land were offered by the proprietors on condition that the institution should be there established. The real advantages from the location of the college are, perhaps, not less considerable to those on the west than to those on the east side of Connecticut River. The clause which constitutes the incorporation and expresses the objects for which it was made, declares those objects to be the instruction of the Indians, "and also of English youth, and any others." So that the objects of the contributors and the incor-

porating act were the same: the promotion of Christianity and of education generally, not the interests of New Hampshire particularly.

From this review of the charter it appears that Dartmouth College is an eleemosynary institution, incorporated for the purpose of perpetuating the application of the bounty of the donors to the specified objects of that bounty; that its trustees or governors were originally named by the founder and invested with the power of perpetuating themselves; that they are not public officers, nor is it a civil institution, participating in the administration of government; but a charity school or a seminary of education, incorporated for the preservation of its property and the perpetual application of that property to the objects of its creation.

Yet a question remains to be considered, of more real difficulty, on which more doubt has been entertained than on all that have been discussed. The founders of the college, at least those whose contributions were in money, have parted with the property bestowed upon it, and their representatives have no interest in that property. The donors of land are equally without interest so long as the corporation shall exist. Could they be found, they are unaffected by any alteration in its constitution, and probably regardless of its form, or even of its existence. The students are fluctuating, and no individual among our youth has a vested interest in the institution which can be asserted in a court of justice. Neither the founders of the college, nor the youth for whose benefit it was founded, complain of the alteration made in its charter or think themselves injured by it. The trustees alone complain, and the trustees have no beneficial interest to be protected. Can this be such a contract as the Constitution intended to withdraw from the power of State legislation? Contracts, the parties to which have a vested beneficial interest, and those only, it has been said, are the objects about which the Constitution is solicitous, and to which its protection is extended.

The court has bestowed on this argument the most deliberate consideration, and the result will be stated. Dr. Wheelock, acting for himself, and for those who, at his solicitation, had made contributions to his school, applied for this charter, as the instrument which should enable him and them to perpetuate their beneficent intention. It was granted. An artificial, immortal being was created by the Crown, capable of receiving and distributing forever, according to the will of the donors, the donations which should be made to it. On this being the contributions which had been collected were immediately bestowed. These gifts were made, not indeed to make a profit for the donors or their posterity, but

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for something in their opinion of inestimable value; for something which they deemed a full equivalent for the money with which it was purchased. The consideration for which they stipulated is the perpetual application of the fund to its object in the mode prescribed by themselves. Their descendants may take no interest in the preservation of this consideration. But in this respect their descendants are not their representatives. They are represented by the corporation. The corporation is the assignee of their rights, stands in their place, and distributes their bounty as they would themselves have distributed it had they been immortal. So with respect to the students who are to derive learning from this source. The corporation is a trustee for them also. Their potential rights, which, taken distributively, are imperceptible, amount collectively to a most important interest. These are, in the aggregate, to be exercised, asserted, and protected by the corporation. They were as completely out of the donors at the instant of their being vested in the corporation, and as incapable of being asserted by the students, as at present.

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According to the theory of the British Constitution, their Parliament is omnipotent. To annul corporate rights might give a shock to public opinion, which that government has chosen to avoid; but its power is not questioned. Had Parliament, immediately after the emanation of this charter, and the execution of those conveyances which followed it, annulled the instrument, so that the living donors would have witnessed the disappointment of their hopes, the perfidy of the transaction would have been universally acknowledged. Yet then, as now, the donors would have had no interest in the property; then, as now, those who might be students would have had no rights to be violated; then, as now, it might be said that the trustees, in whom the rights of all were combined, possessed no private, individual, beneficial interest in the property confided to their protection. Yet the contract would at that time have been deemed sacred by all. What has since occurred to strip it of its inviolability? Circumstances have not changed it. In reason, in justice, and in law, it is now what it was in 1769.

R.

This is plainly a contract to which the donors, the trustees, and the Crown (to whose rights and obligations New Hampshire succeeds) were the original parties. It is a contract made on a valuable consideration. It is a contract for the security and disposition of property. It is a contract on the faith of which real and personal estate has been conveyed to the corporation. It is, then, a contract within the letter of the Constitution, and within its spirit also, unless the fact that the property is invested by the donors in trustees for the promotion of religion and education,

for the benefit of persons who are perpetually changing, though the objects remain the same, shall create a particular exception, taking this case out of the prohibition contained in the Constitution.

It is more than possible that the preservation of rights of this description was not particularly in the view of the framers of the Constitution when the clause under consideration was introduced into that instrument. It is probable that interferences of more frequent recurrence, to which the temptation was stronger, and of which the mischief was more extensive, constituted the great motive for imposing this restriction on the State legislatures. But although a particular and a rare case may not in itself be of sufficient magnitude to induce a rule, yet it must be governed by the rule, when established, unless some plain and strong reason for excluding it can be given. It is not enough to say that this particular case was not in the mind of the Convention when the article was framed, nor of the American people when it was adopted. It is necessary to go farther, and to say that had this particular case been suggested, the language would have been so varied as to exclude it, or it would have been made a special exception. \ The case being within the words of the rule, must be within its operation likewise, unless there be something in the literal construction so obviously absurd, or mischievous, or repugnant to the general spirit of the instrument, as to justify those who expound the Constitution in making it an exception. /

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On what safe and intelligible ground can this exception stand? There is no expression in the Constitution, no sentiment delivered by its contemporaneous expounders, which would justify us in making it. In the absence of all authority of this kind, is there, in the nature and reason of the case itself, that which would sustain a construction of the Constitution not warranted by its words? Are contracts of this description of a character to excite so little interest that we must exclude them from the provisions of the Constitution as being unworthy of the attention of those who framed the instrument? Or does public policy so imperiously demand their remaining exposed to legislative alteration as to compel us, or rather permit us, to say that these words, which were introduced to give stability to contracts, and which in their plain import comprehend this contract, must yet be so construed as to exclude it?

Almost all eleemosynary corporations, those which are created for the promotion of religion, of charity, or of education, are of the same character. The law of this case is the law of all. In every literary or charitable institution, unless the objects of the bounty be themselves incorporated, the whole legal interest is in

trustees, and can be asserted only by them. The donors, or claimants of the bounty, if they can appear in court at all, can appear only to complain of the trustees. In all other situations they are identified with and personated by the trustees; and their rights are to be defended and maintained by them. Religion, charity, and education are, in the law of England, legatees or donees, capable of receiving bequests or donations in this form. They appear in court, and claim or defend by the corporation. Are they of so little estimation in the United States that contracts for their benefit must be excluded from the protection of words which in their natural import include them? Or do such contracts so necessarily require new modelling by the authority of the legislature that the ordinary rules of construction must be disregarded in order to leave them exposed to legislative alteration?

All feel that these objects are not deemed unimportant in the United States. The interest which this case has excited proves that they are not. The framers of the Constitution did not deem them unworthy of its care and protection. They have, though in a different mode, manifested their respect for science by reserving to the Government of the Union the power "to promote the progress of science and useful arts by securing for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries." They have so far withdrawn science and the useful arts from the action of the State governments. Why then should they be supposed so regardless of contracts made for the advancement of literature as to intend to exclude them from provisions made for the security of ordinary contracts between man and man? No reason for making this supposition is perceived.

If the insignificance of the object does not require that we should exclude contracts respecting it from the protection of the Constitution, neither, as we conceive, is the policy of leaving them subject to legislative alteration so apparent as to require a forced construction of that instrument in order to effect it. These eleemosynary institutions do not fill the place which would otherwise be occupied by government, but that which would otherwise remain vacant. They are complete acquisitions to literature. They are donations to education; donations which any government must be disposed rather to encourage than to discountenance. It requires no very critical examination of the human mind to enable us to determine that one great inducement to these gifts is the conviction felt by the giver that the disposition he makes of them is immutable. It is probable that no man ever was, and that no man ever will be, the founder of a college believing at the time that an act of incorporation constitutes no security for the insti-

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tution; believing that it is immediately to be deemed a public institution, whose funds are to be governed and applied not by the will of the donor, but by the will of the legislature. All such gifts are made in the pleasing, perhaps delusive, hope that the charity will flow forever in the channel which the givers have marked out for it. If every man finds in his own bosom strong evidence of the universality of this sentiment, there can be but little reason to imagine that the framers of our Constitution were strangers to it, and that, feeling the necessity and policy of giving permanence and security to contracts, of withdrawing them from the influence of legislative bodies, whose fluctuating policy and repeated interferences produced the most perplexing and injurious embarrassments, they still deemed it necessary to leave these contracts subject to those interferences. The motives for such an exception must be very powerful to justify the construction which makes it.

The motives suggested at the Bar grow out of the original appointment of the trustees, which is supposed to have been in a spirit hostile to the genius of our government, and the presumption that, if allowed to continue themselves, they now are, and must remain forever, what they originally were. Hence is inferred the necessity of applying to this corporation, and to other similar corporations, the correcting and improving hand of the legislature.

It has been urged repeatedly, and certainly with a degree of earnestness which attracted attention, that the trustees, deriving their power from a regal source, must necessarily partake of the spirit of their origin; and that their first principles, unimproved by that resplendent light which has been shed around them, must continue to govern the college and to guide the students. Before we inquire into the influence which this argument ought to have on the constitutional question, it may not be amiss to examine the fact on which it rests. The first trustees were undoubtedly named in the charter by the Crown; but at whose suggestion were they named? By whom were they selected? The charter informs us. Dr. Wheelock had represented "that for many weighty reasons it would be expedient that the gentlemen whom he had already nominated in his last will to be trustees in America should be of the corporation now proposed." When, afterward, the trustees are named in the charter, can it be doubted that the persons mentioned by Dr. Wheelock in his will were appointed? Some were probably added by the Crown with the approbation of Dr. Wheelock. Among these is the doctor himself. If any others were appointed at the instance of the Crown, they are the Governor, three members of the Council, and the Speaker of the House of

The first trustees were named by the crown, at the suggestion of Dr. Wheelock

Representatives of the colony of New Hampshire. The stations filled by these persons ought to rescue them from any other imputation than too great a dependence on the Crown. If in the Revolution that followed they acted under the influence of this sentiment, they must have ceased to be trustees; if they took part with their countrymen, the imputation which suspicion might excite would no longer attach to them. The original trustees, then, or most of them, were named by Dr. Wheelock, and those who were added to his nomination, most probably with his approbation, were among the most eminent and respectable individuals in New Hampshire.

The only evidence which we possess of the character of Dr. Wheelock is furnished by this charter. The judicious means employed for the accomplishment of his object, and the success which attended his endeavors, would lead to the opinion that he united a sound understanding to that humanity and benevolence which suggested his undertaking. It surely cannot be assumed that his trustees were selected without judgment. With as little probability can it be assumed that while the light of science and of liberal principles pervades the whole community, these originally benighted trustees remain in utter darkness, incapable of participating in the general improvement; that while the human race is rapidly advancing they are stationary. Reasoning *à priori*, we should believe that learned and intelligent men, selected by its patrons for the government of a literary institution, would select learned and intelligent men for their successors; men as well fitted for the government of a college as those who might be chosen by other means. Should this reasoning ever prove erroneous in a particular case, public opinion, as has been stated at the Bar, would correct the institution. The mere possibility of the contrary would not justify a construction of the Constitution which should exclude these contracts from the protection of a provision whose terms comprehend them.

Dec. (The opinion of the court, after mature deliberation, is that this is a contract, the obligation of which cannot be impaired without violating the Constitution of the United States. This opinion appears to us to be equally supported by reason and by the former decisions of this court.

2. We next proceed to the inquiry whether its obligation has been impaired by those acts of the legislature of New Hampshire to which the special verdict refers.

decisions of Trustees (From the review of this charter which has been taken it appears that the whole power of governing the college, of appointing and removing tutors, of fixing their salaries, of directing the course of study to be pursued by the students, and of filling up vacancies

created in their own body, was vested in the trustees. On the part of the Crown it was expressly stipulated that this corporation thus constituted should continue forever; and that the number of trustees should forever consist of twelve, and no more. By this contract the Crown was bound, and could have made no violent alteration in its essential terms without impairing its obligation.

By the Revolution, the duties as well as the powers of government devolved on the people of New Hampshire. It is admitted that among the latter was comprehended the transcendent power of Parliament, as well as that of the executive department. It is too clear to require the support of argument that all contracts and rights respecting property remained unchanged by the Revolution. The obligations, then, which were created by the charter to Dartmouth College were the same in the new that they had been in the old government. The power of the government was also the same. A repeal of this charter at any time prior to the adoption of the present Constitution of the United States would have been an extraordinary and an unprecedented act of power, but one which could have been contested only by the restrictions upon the legislature to be found in the Constitution of the State. But the Constitution of the United States has imposed this additional limitation that the legislature of a State shall pass no act "impairing the obligation of contracts."

It has been already stated that the act "to amend the charter and enlarge and improve the corporation of Dartmouth College" increases the number of trustees to twenty-one, gives the appointment of the additional members to the Executive of the State, and creates a board of overseers, to consist of twenty-five persons, of whom twenty-one are also appointed by the Executive of New Hampshire, who have power to inspect and control the most important acts of the trustees.

On the effect of this law two opinions cannot be entertained. Between acting directly and acting through the agency of trustees and overseers no essential difference is perceived. The whole power of governing the college is transferred from trustees, appointed according to the will of the founder expressed in the charter, to the Executive of New Hampshire. The management and application of the funds of this eleemosynary institution, which are placed by the donors in the hands of trustees named in the charter, and empowered to perpetuate themselves, are placed by this act under the control of the government of the State. The will of the State is substituted for the will of the donors in every essential operation of the college. This is not an immaterial change. The founders of the college contracted not merely for

R the perpetual application of the funds which they gave to the objects for which those funds were given, they contracted also to secure that application by the constitution of the corporation. They contracted for a system which should, as far as human foresight can provide, retain forever the government of the literary institution they had formed in the hands of persons approved by themselves. // This system is totally changed. The charter of 1769 exists no longer. It is reorganized; and reorganized in such a manner as to convert a literary institution, moulded according to the will of its founders, and placed under the control of private literary men, into a machine entirely subservient to the will of government. This may be for the advantage of this college in particular, and may be for the advantage of literature in general; but it is not according to the will of the donors, and is subversive of that contract, on the faith of which their property was given.)

In the view which has been taken of this interesting case the court has confined itself to the rights possessed by the trustees as the assignees and representatives of the donors and founders for the benefit of religion and literature. Yet it is not clear that the trustees ought to be considered as destitute of such beneficial interest in themselves as the law may respect. In addition to their being the legal owners of the property, and to their having a freehold right in the powers confided to them, the charter itself countenances the idea that trustees may also be tutors with salaries. The first president was one of the original trustees; and the charter provides that in case of vacancy in that office "the senior professor or tutor, *being one of the trustees*, shall exercise the office of president until the trustees shall make choice of and appoint a president." According to the tenor of the charter, then, the trustees might, without impropriety, appoint a president and other professors from their own body. This is a power not entirely unconnected with an interest. Even if the proposition of the counsel for the defendant were sustained, if it were admitted that those contracts only are protected by the Constitution, a beneficial interest in which is vested in the party who appears in court to assert that interest, yet it is by no means clear that the trustees of Dartmouth College have no beneficial interest in themselves.

But the court has deemed it unnecessary to investigate this particular point, being of opinion, on general principles, that in these private eleemosynary institutions the body corporate, as possessing the whole legal and equitable interest, and completely representing the donors for the purpose of executing the trust, has rights which are protected by the Constitution.

It results from this opinion that the acts of the legislature of New Hampshire, which are stated in the special verdict found in

this cause, are repugnant to the Constitution of the United States, and that the judgment on this special verdict ought to have been for the plaintiffs. The judgment of the State court must, therefore, be reversed.

THE PROPRIETORS OF THE CHARLES RIVER
BRIDGE, PLAINTIFFS IN ERROR, v. THE PROPRIETORS
OF THE WARREN BRIDGE AND OTHERS.

IN THE SUPREME COURT OF THE UNITED STATES, JANUARY TERM,
1837.

[*Reported in 11 Peters 420.*]

TANEY, Ch. J., delivered the opinion of the court.¹

The questions involved in this case are of the gravest character, and the court have given to them the most anxious and deliberate consideration. The value of the right claimed by the plaintiffs is large in amount; and many persons may no doubt be seriously affected in their pecuniary interests by any decision which the court may pronounce; and the questions which have been raised as to the power of the several States, in relation to the corporations they have chartered, are pregnant with important consequences, not only to the individuals who are concerned in the corporate franchises, but to the communities in which they exist. The court are fully sensible that it is their duty, in exercising the high powers conferred on them by the Constitution of the United States, to deal with these great and extensive interests with the utmost caution; guarding, as far as they have the power to do so, the rights of property, and at the same time carefully abstaining from any encroachment on the rights reserved to the States.

It appears from the record that in the year 1650 the legislature of Massachusetts granted to the president of Harvard College "the liberty and power" to dispose of the ferry from Charlestown to Boston, by lease or otherwise, in the behalf and for the behoof of the college; and that, under that grant, the college continued to hold and keep the ferry by its lessees or agents, and to receive the profits of it until 1785. In the last-mentioned year a petition was presented to the legislature by Thomas Russell and others, stating the inconvenience of the transportation by ferries over Charles River, and the public advantages that would result from a bridge;

¹The statement of facts and the opinions of the associate justices have been omitted.—ED.

and praying to be incorporated for the purpose of erecting a bridge in the place where the ferry between Boston and Charlestown was then kept. Pursuant to this petition, the legislature, on the 9th of March, 1785, passed an act incorporating a company by the name of "The Proprietors of the Charles River Bridge" for the purposes mentioned in the petition. Under this charter the company were empowered to erect a bridge in "the place where the ferry was then kept;" certain tolls were granted, and the charter was limited to forty years from the first opening of the bridge for passengers; and from the time the toll commenced until the expiration of this term the company were to pay two hundred pounds annually to Harvard College; and at the expiration of the forty years the bridge was to be the property of the commonwealth; "saving (as the law expresses it) to the said college or university a reasonable annual compensation for the annual income of the ferry which they might have received had not the said bridge been erected."

The bridge was accordingly built, and was opened for passengers on the 17th of June, 1786. In 1792 the charter was extended to seventy years from the opening of the bridge; and at the expiration of that time it was to belong to the commonwealth. The corporation have regularly paid to the college the annual sum of two hundred pounds, and have performed all of the duties imposed on them by the terms of their charter.

In 1828 the legislature of Massachusetts incorporated a company by the name of "The Proprietors of the Warren Bridge" for the purpose of erecting another bridge over Charles River. This bridge is only sixteen rods, at its commencement on the Charlestown side, from the commencement of the bridge of the plaintiffs; and they are about fifty rods apart at their termination on the Boston side. The travellers who pass over either bridge proceed from Charlestown Square, which receives the travel of many great public roads leading from the country; and the passengers and travellers who go to and from Boston used to pass over the Charles River bridge from and through this square before the erection of the Warren bridge.

The Warren bridge by the terms of its charter was to be surrendered to the State as soon as the expenses of the proprietors in building and supporting it should be reimbursed; but this period was not, in any event, to exceed six years from the time the company commenced receiving toll.

When the original bill in this case was filed, the Warren bridge had not been built, and the bill was filed after the passage of the law, in order to obtain an injunction to prevent its erection, and for general relief. The bill, among other things, charged as a

ground for relief that the act for the erection of the Warren bridge impaired the obligation of the contract between the commonwealth and the proprietors of the Charles River bridge, and was, therefore, repugnant to the Constitution of the United States. Afterward a supplemental bill was filed, stating that the bridge had then been so far completed that it had been opened for travel, and that divers persons had passed over, and thus avoided the payment of the toll which would otherwise have been received by the plaintiffs. The answer to the supplemental bill admitted that the bridge had been so far completed that foot passengers could pass, but denied that any persons but the workmen and the superintendents had passed over with their consent. In this state of the pleadings the cause came on for hearing in the Supreme Judicial Court for the County of Suffolk, in the commonwealth of Massachusetts, at November term, 1829, and the court decided that the act incorporating the Warren bridge did not impair the obligation of the contract with the proprietors of the Charles River bridge, and dismissed the complainants' bill; and the case is brought here by writ of error from that decision. It is, however, proper to state that it is understood that the State court was equally divided upon the question; and that the decree dismissing the bill upon the ground above stated was pronounced by a majority of the court for the purpose of enabling the complainants to bring the question for decision before this court.

In the argument here it was admitted that since the filing of the supplemental bill a sufficient amount of toll had been received by the proprietors of the Warren bridge to reimburse all their expenses, and that the bridge is now the property of the State, and has been made a free bridge; and that the value of the franchise granted to the proprietors of the Charles River bridge has by this means been entirely destroyed.

If the complainants deemed these facts material, they ought to have been brought before the State court by a supplemental bill; and this court, in pronouncing its judgment, cannot regularly notice them. But in the view which the court take of this subject these additional circumstances would not in any degree influence their decision. And as they are conceded to be true, and the case has been argued on that ground, and the controversy has been for a long time depending, and all parties desire a final end of it; and as it is of importance to them that the principles on which this court decide should not be misunderstood, the case will be treated in the opinion now delivered as if these admitted facts were regularly before us.

A good deal of evidence has been offered to show the nature and extent of the ferry right granted to the college, and also to

show the rights claimed by the proprietors of the bridge at different times by virtue of their charter, and the opinions entertained by committees of the legislature and others upon that subject. But as these circumstances do not affect the judgment of this court, it is unnecessary to recapitulate them.

The plaintiffs in error insist mainly upon two grounds: 1st. That by virtue of the grant of 1650 Harvard College was entitled, in perpetuity, to the right of keeping a ferry between Charlestown and Boston; that this right was exclusive; and that the legislature had not the power to establish another ferry on the same line of travel, because it would infringe the rights of the college; and that these rights, upon the erection of the bridge in the place of the ferry under the charter of 1785, were transferred to and became vested in "The Proprietors of the Charles River Bridge;" and that under and by virtue of this transfer of the ferry right the rights of the bridge company were as exclusive in that line of travel as the rights of the ferry. 2d. That independently of the ferry right, the acts of the legislature of Massachusetts of 1785 and 1792 by their true construction necessarily implied that the legislature would not authorize another bridge, and especially a free one, by the side of this and placed in the same line of travel, whereby the franchise granted to "The Proprietors of the Charles River Bridge" should be rendered of no value; and the plaintiffs in error contend that the grant of the ferry to the college, and of the charter to the proprietors of the bridge, are both contracts on the part of the State; and that the law authorizing the erection of the Warren bridge in 1828 impairs the obligation of one or both of these contracts.

It is very clear that in the form in which this case comes before us, being a writ of error to a State court, the plaintiffs in claiming under either of these rights must place themselves on the ground of contract, and cannot support themselves upon the principle that the law divests vested rights. It is well settled by the decisions of this court that a State law may be retrospective in its character and may divest vested rights, and yet not violate the Constitution of the United States, unless it also impairs the obligation of a contract. In *Satterlee v. Mathewson*, 2 Peters, 413, this court, in speaking of the State law then before them, and interpreting the article in the Constitution of the United States which forbids the States to pass laws impairing the obligation of contracts, use the following language: "It (the State law) is said to be retrospective; be it so. But retrospective laws which do not impair the obligation of contracts, or partake of the character of *ex post facto* laws, are not condemned or forbidden by any part of that instrument" (the Constitution of the United

Rights to
Harvard
College.

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Charles
River
grant.

States). And in another passage in the same case the court say: "The objection, however, most pressed upon the court, and relied upon by the counsel for the plaintiff in error, was that the effect of this act was to divest rights which were vested by law in Satterlee. There is certainly no part of the Constitution of the United States which applies to a State law of this description; nor are we aware of any decision of this, or of any circuit court, which has condemned such a law upon this ground, provided its effect be not to impair the obligation of a contract." The same principles were reaffirmed in this court in the late case of *Watson and others v. Mercer*, decided in 1834, 8 Pet. 110: "As to the first point (say the court), it is clear that this court has no right to pronounce an act of the State legislature void, as contrary to the Constitution of the United States, from the mere fact that it divests antecedent vested rights of property. The Constitution of the United States does not prohibit the States from passing retrospective laws generally, but only *ex post facto* laws."

After these solemn decisions of this court it is apparent that the plaintiffs in error cannot sustain themselves here, either upon the ferry right or the charter to the bridge upon the ground that vested rights of property have been divested by the legislature. And whether they claim under the ferry right or the charter to the bridge, they must show that the title which they claim was acquired by contract and that the terms of that contract have been violated by the charter to the Warren bridge. In other words, they must show that the State had entered into a contract with them or those under whom they claim not to establish a free bridge at the place where the Warren bridge is erected. Such, and such only, are the principles upon which the plaintiffs in error can claim relief in this case.

The nature and extent of the ferry right granted to Harvard College in 1650 must depend upon the laws of Massachusetts; and the character and extent of this right has been elaborately discussed at the Bar. But in the view which the court take of the case before them, it is not necessary to express any opinion on these questions. For assuming that the grant to Harvard College and the charter to the bridge company were both contracts, and that the ferry right was as extensive and exclusive as the plaintiffs contend for, still they cannot enlarge the privileges granted to the bridge, unless it can be shown that the rights of Harvard College in this ferry have, by assignment or in some other way, been transferred to the proprietors of the Charles River bridge, and still remain in existence, vested in them, to the same extent with that in which they were held and enjoyed by the college before the bridge was built.

It has been strongly pressed upon the court by the plaintiffs in error that these rights are still existing, and are now held by the proprietors of the bridge. If this franchise still exists, there must be somebody possessed of authority to use it and to keep the ferry. Who could now lawfully set up a ferry where the old one was kept? The bridge was built in the same place, and its abutments occupied the landings of the ferry. The transportation of passengers in boats from landing to landing was no longer possible, and the ferry was as effectually destroyed as if a convulsion of nature had made there a passage of dry land. The ferry, then, of necessity, ceased to exist as soon as the bridge was erected; and when the ferry itself was destroyed, how can rights which were incident to it be supposed to survive? The exclusive privileges, if they had such, must follow the fate of the ferry, and can have no legal existence without it—and if the ferry right had been assigned by the college, in due and legal form, to the proprietors of the bridge, they themselves extinguished that right when they erected the bridge in its place. It is not supposed by any one that the bridge company have a right to keep a ferry. No such right is claimed for them, nor can be claimed for them, under their charter to erect the bridge—and it is difficult to imagine how ferry rights can be held by a corporation or an individual who have no right to keep a ferry. It is clear that the incident must follow the fate of the principal, and the privilege connected with property cannot survive the destruction of the property; and if the ferry right in Harvard College was exclusive, and had been assigned to the proprietors of the bridge, the privilege of exclusion could not remain in the hands of their assignees if those assignees destroyed the ferry.

But upon what ground can the plaintiffs in error contend that the ferry rights of the college have been transferred to the proprietors of the bridge? If they have been thus transferred, it must be by some mode of transfer known to the law; and the evidence relied on to prove it can be pointed out in the record. How was it transferred? It is not suggested that there ever was, in point of fact, a deed of conveyance executed by the college to the bridge company. Is there any evidence in the record from which such a conveyance may, upon legal principle, be presumed? The testimony before the court, so far from laying the foundation for such a presumption repels it in the most positive terms. The petition to the legislature, in 1785, on which the charter was granted, does not suggest an assignment, nor any agreement or consent on the part of the college; and the petitioners do not appear to have regarded the wishes of that institution as by any means necessary to ensure their success. They place their application entirely on considerations of public interest and public convenience and the

*Right to land
not annexed
to ferry.*

superior advantages of a communication across Charles River by a bridge, instead of a ferry. The legislature in granting the charter show by the language of the law that they acted on the principles assumed by the petitioners. The preamble recites that the bridge "will be of great public utility," and that is the only reason they assign for passing the law which incorporates this company. The validity of the charter is not made to depend on the consent of the college, nor of any assignment or surrender on their part; and the legislature deal with the subject as if it were one exclusively within their own power, and as if the ferry right were not to be transferred to the bridge company, but to be extinguished; and they appear to have acted on the principle that the State, by virtue of its sovereign powers and eminent domain, had a right to take away the franchise of the ferry, because, in their judgment, the public interest and convenience would be better promoted by a bridge in the same place; and upon that principle they proceed to make a pecuniary compensation to the college for the franchise thus taken away; and as there is an express reservation of a continuing pecuniary compensation to the college when the bridge shall become the property of the State, and no provision whatever for the restoration of the ferry right, it is evident that no such right was intended to be reserved or continued. The ferry, with all its privileges, was intended to be forever at an end, and a compensation in money was given in lieu of it. The college acquiesced in this arrangement, and there is proof in the record that it was all done with their consent. Can a deed of assignment to the bridge company which would keep alive the ferry rights in their hands be presumed under such circumstances? Do not the petition, the law of incorporation, and the consent of the college to the pecuniary provision made for it in perpetuity, all repel the notion of an assignment of its rights to the bridge company, and prove that every party to this proceeding intended that its franchises whatever they were should be resumed by the State, and be no longer held by any individual or corporation? With such evidence before us there can be no ground for presuming a conveyance to the plaintiffs. There was no reason for such a conveyance. There was every reason against it; and the arrangements proposed by the charter to the bridge could not have been carried into full effect, unless the rights of the ferry were entirely extinguished.

It is, however, said that the payment of the two hundred pounds a year to the college, as provided for in the law, gives to the proprietors of the bridge an equitable claim to be treated as the assignees of their interest; and by substitution, upon chancery principles, to be clothed with all their rights.

*regulation
franchise
being right
on it they
were
extinguished*

The answer to this argument is obvious. This annual sum was intended to be paid out of the proceeds of the tolls which the company were authorized to collect. The amount of the tolls, it must be presumed, was graduated with a view to this incumbrance, as well as to every other expenditure to which the company might be subjected, under the provisions of their charter. The tolls were to be collected from the public, and it was intended that the expense of the annuity to Harvard College should be borne by the public; and it is manifest that it was so borne, from the amount which it is admitted they received, until the Warren bridge was erected. Their agreement, therefore, to pay that sum can give them no equitable right to be regarded as the assignees of the college, and certainly can furnish no foundation for presuming a conveyance; and as the proprietors of the bridge are neither the legal nor equitable assignees of the college, it is not easy to perceive how the ferry franchise can be invoked in aid of their claims, if it were even still a subsisting privilege, and had not been resumed by the State for the purpose of building a bridge in its place.

Dec. 1

Neither can the extent of the pre-existing ferry right, whatever it may have been, have any influence upon the construction of the written charter for the bridge. It does not by any means follow that because the legislative power in Massachusetts in 1650 may have granted to a justly favored seminary of learning the exclusive right of ferry between Boston and Charlestown they would, in 1785, give the same extensive privilege to another corporation, who were about to erect a bridge in the same place. The fact that such a right was granted to the college cannot, by any sound rule of construction, be used to extend the privileges of the bridge company beyond what the words of the charter naturally and legally import. Increased population longer experienced in legislation, the different character of the corporations which owned the ferry from that which owned the bridge, might well have induced a change in the policy of the State in this respect; and as the franchise of the ferry and that of the bridge are different in their nature, and were each established by separate grants, which have no words to connect the privileges of the one with the privileges of the other, there is no rule of legal interpretation which would authorize the court to associate these grants together, and to infer that any privilege was intended to be given to the bridge company merely because it had been conferred on the ferry. The charter to the bridge is a written instrument, which must speak for itself and be interpreted by its own terms.

This brings us to the act of the legislature of Massachusetts of 1785, by which the plaintiffs were incorporated by the name of

"The Proprietors of the Charles River Bridge;" and it is here, and in the law of 1792, prolonging their charter, that we must look for the extent and nature of the franchise conferred upon the plaintiffs.

Much has been said in the argument of the principles of construction by which this law is to be expounded, and what undertakings on the part of the State may be implied. The court think there can be no serious difficulty on that head. It is the grant of certain franchises by the public to a private corporation, and in a matter where the public interest is concerned. The rule of construction in such cases is well settled, both in England and by the decisions of our own tribunals. In 2 Barn. & Adol. 793, in the case of the Proprietors of the Stourbridge Canal against Wheely and others, the court say: "The canal having been made under an act of Parliament, the rights of the plaintiffs are derived entirely from that act. This, like many other cases, is a bargain between a company of adventurers and the public, the terms of which are expressed in the statute; and the rule of construction in all such cases is now fully established to be this: that any ambiguity in the terms of the contract must operate against the adventurers and in favor of the public, and the plaintiffs can claim nothing that is not clearly given them by the act." And the doctrine thus laid down is abundantly sustained by the authorities referred to in this decision. The case itself was as strong a one as could well be imagined for giving to the canal company, by implication, a right to the tolls they demanded. Their canal had been used by the defendants to a very considerable extent in transporting large quantities of coal. The rights of all persons to navigate the canal were expressly secured by the act of Parliament, so that the company could not prevent them from using it, and the toll demanded was admitted to be reasonable. Yet, as they only used one of the levels of the canal, and did not pass through the locks, and the statute, in giving the right to exact toll, had given it for articles which passed "*through any one or more of the locks,*" and had said nothing as to toll for navigating one of the levels, the court held that the right to demand toll in the latter case could not be implied, and that the company were not entitled to recover it. This was a fair case for an equitable construction of the act of incorporation and for an implied grant, if such a rule of construction could ever be permitted in a law of that description. For the canal had been made at the expense of the company; the defendants had availed themselves of the fruits of their labors, and used the canal freely and extensively for their own profit. Still the right to exact toll could not be implied, because such a privilege was not found in the charter.

*an act
of incorporation
constituted in
favor of the
public*

Borrowing, as we have done, our system of jurisprudence from the English law, and having adopted in every other case, civil and criminal, its rules for the construction of statutes, is there anything in our local situation, or in the nature of our political institutions, which would lead us to depart from the principle where corporations are concerned? Are we to apply to acts of incorporation a rule of construction differing from that of the English law, and by implication make the terms of a charter in one of the States more unfavorable to the public than, upon an act of Parliament, framed in the same words, would be sanctioned in an English court? Can any good reason be assigned for excepting this particular class of cases from the operation of the general principle, and for introducing a new and adverse rule of construction in favor of corporations, while we adopt and adhere to the rules of construction known to the English common law in every other case without exception? We think not; and it would present a singular spectacle if, while the courts in England are restraining, within the strictest limits, the spirit of monopoly, and exclusive privileges in nature of monopolies, and confining corporations to the privileges plainly given to them in their charter, the courts of this country should be found enlarging these privileges by implication, and construing a statute more unfavorably to the public and to the rights of the community than would be done in a like case in an English court of justice.

*Don't have
to follow
England.*

But we are not now left to determine, for the first time, the rules by which public grants are to be construed in this country. The subject has already been considered in this court, and the rule of construction above stated fully established. In the case of the United States v. Arredondo, 8 Pet. 738, the leading cases upon this subject are collected together by the learned judge who delivered the opinion of the court, and the principle recognized that in grants by the public nothing passes by implication.

*nothing
passes by
implication*

The rule is still more clearly and plainly stated in the case of Jackson v. Lamphire, in 3 Pet. 289. That was a grant of land by the State; and in speaking of this doctrine of implied covenants in grants by the State, the court use the following language, which is strikingly applicable to the case at Bar: "The only contract made by the State is the grant to John Cornelius, his heirs and assigns, of the land in question. The patent contains no covenant to do or not to do any further act in relation to the land; and we do not feel ourselves at liberty in this case to create one by implication. The State has not, by this act, impaired the force of the grant; it does not profess or attempt to take the land from the assigns of Cornelius, and give it to one not claiming under him; neither does the award produce that effect; the grant re-

mains in full force; the property conveyed is held by his grantee, and the State asserts no claim to it."

The same rule of construction is also stated in the case of *Beatty v. The Lessee of Knowles*, 4 Pet. 168, decided in this court in 1830. In delivering their opinion in that case, the court say: "That a corporation is strictly limited to the exercise of those powers which are specifically conferred on it will not be denied. The exercise of the corporate franchise being restrictive of individual rights, cannot be extended beyond the letter and spirit of the act of incorporation."

But the case most analogous to this, and in which the question came more directly before the court, is the case of the *Providence Bank v. Billings & Pittmann*, 4 Pet. 514, and which was decided in 1830. In that case it appeared that the legislature of Rhode Island had chartered the bank in the usual form of such acts of incorporation. The charter contained no stipulation on the part of the State that it would not impose a tax on the bank nor any reservation of the right to do so. It was silent on this point. Afterward a law was passed imposing a tax on all banks in the State, and the right to impose this tax was resisted by the Providence Bank upon the ground that if the State could impose a tax it might tax so heavily as to render the franchise of no value and destroy the institution; that the charter was a contract, and that a power which may in effect destroy the charter is inconsistent with it, and is impliedly renounced by granting it. But the court said that the taxing power was of vital importance, and essential to the existence of government; and that the relinquishment of such a power is never to be assumed. And in delivering the opinion of the court the late Chief Justice states the principle in the following clear and emphatic language. Speaking of the taxing power, he says: "As the whole community is interested in retaining it undiminished, that community has a right to insist that its abandonment ought not to be presumed in a case in which the deliberate purpose of the State to abandon it does not appear." The case now before the court is, in principle, precisely the same. It is a charter from a State. The act of incorporation is silent in relation to the contested power. The argument in favor of the proprietors of the Charles River bridge is the same almost in words with that used by the Providence Bank; that is, that the power claimed by the State, if it exists, may be so used as to destroy the value of the franchise they have granted to the corporation. The argument must receive the same answer; and the fact that the power has been already exercised so as to destroy the value of the franchise cannot in any degree affect the principle.

*How
preserved
main
preserved*

The existence of the power does not and cannot depend upon the circumstance of its having been exercised or not.

It may, perhaps, be said that in the case of the Providence Bank this court were speaking of the taxing power, which is of vital importance to the very existence of every government. But the object and end of all government is to promote the happiness and prosperity of the community by which it is established; and it can never be assumed that the government intended to diminish its power of accomplishing the end for which it was created. And in a country like ours, free, active, and enterprising, continually advancing in numbers and wealth, new channels of communication are daily found necessary, both for travel and trade, and are essential to the comfort, convenience, and prosperity of the people. A State ought never to be presumed to surrender this power, because, like the taxing power, the whole community have an interest in preserving it undiminished. And when a corporation alleges that a State has surrendered for seventy years its power of improvement and public accommodation in a great and important line of travel, along which a vast number of its citizens must daily pass, the community have a right to insist, in the language of this court above quoted, "that its abandonment ought not to be presumed in a case in which the deliberate purpose of the State to abandon it does not appear." The continued existence of a government would be of no great value if by implications and presumptions it was disarmed of the powers necessary to accomplish the ends of its creation, and the functions it was designed to perform transferred to the hands of privileged corporations. The rule of construction announced by the court was not confined to the taxing power, nor is it so limited in the opinion delivered. On the contrary, it was distinctly placed on the ground that the interests of the community were concerned in preserving, undiminished, the power then in question; and whenever any power of the State is said to be surrendered or diminished, whether it be the taxing power or any other affecting the public interest, the same principle applies, and the rule of construction must be the same. No one will question that the interests of the great body of the people of the State would in this instance be affected by the surrender of this great line of travel to a single corporation, with the right to exact toll and exclude competition for seventy years. While the rights of private property are sacredly guarded, we must not forget that the community also have rights, and that the happiness and well-being of every citizen depend on their faithful preservation.

Adopting the rule of construction above stated as the settled one, we proceed to apply it to the charter of 1785, to the pro-

prietors of the Charles River bridge. This act of incorporation is in the usual form, and the privileges such as are commonly given to corporations of that kind. It confers on them the ordinary faculties of a corporation, for the purpose of building the bridge, and establishes certain rates of toll, which the company are authorized to take. This is the whole grant. There is no ~~exclusive privilege given to them~~ over the waters of Charles River above or below their bridge. No right to erect another bridge themselves, nor to prevent other persons from erecting one. No engagement from the State that another shall not be erected; and no undertaking not to sanction competition, nor to make improvements that may diminish the amount of its income. Upon all these subjects the charter is silent; and nothing is said in it about a line of travel, so much insisted on in the argument, in which they are to have exclusive privileges. No words are used from which an intention to grant any of these rights can be inferred. If the plaintiff is entitled to them, it must be implied simply from the nature of the grant, and cannot be inferred from the words by which the grant is made.

*The bridge
embodied by
an act*

The relative position of the Warren bridge has already been described. It does not interrupt the passage over the Charles River bridge, nor make the way to it or from it less convenient. None of the faculties or franchises granted to that corporation has been revoked by the legislature, and its right to take the tolls granted by the charter remains unaltered. In short, all the franchises and rights of property enumerated in the charter, and there mentioned to have been granted to it, remain unimpaired. But its income is destroyed by the Warren bridge; which, being free, draws off the passengers and property which would have gone over it, and renders their franchise of no value. This is the gist of the complaint. For it is not pretended that the erection of the Warren bridge would have done them any injury, or in any degree affected their right of property, if it had not diminished the amount of their tolls. In order, then, to entitle themselves to relief it is necessary to show that the legislature contracted not to do the act of which they complain; and that they impaired or, in other words, violated that contract by the erection of the Warren bridge.

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The inquiry then is, Does the charter contain such a contract on the part of the State? Is there any such stipulation to be found in that instrument? It must be admitted on all hands that there is none—no words that even relate to another bridge, or to the diminution of their tolls, or to the line of travel. If a contract on that subject can be gathered from the charter, it must be by implication, and cannot be found in the words used. Can such

*no express
stipulation*

an agreement be implied? The rule of construction before stated is an answer to the question. In charters of this description no rights are taken from the public, or given to the corporation, beyond those which the words of the charter, by their natural and proper construction, purport to convey. There are no words which import such a contract as the plaintiffs in error contend for, and none can be implied; and the same answer must be given to them that was given by this court to the Providence Bank. The whole community are interested in this inquiry, and they have a right to require that the power of promoting their comfort and convenience, and of advancing the public prosperity, by providing safe, convenient, and cheap ways for the transportation of produce and the purposes of travel, shall not be construed to have been surrendered or diminished by the State, unless it shall appear by plain words that it was intended to be done.

But the case before the court is even still stronger against any such implied contract as the plaintiffs in error contend for. The Charles River bridge was completed in 1786. The time limited for the duration of the corporation by their original charter expired in 1826. When, therefore, the law passed authorizing the erection of the Warren bridge, the proprietors of Charles River bridge held their corporate existence under the law of 1792, which extended their charter for thirty years; and the rights, privileges, and franchises of the company must depend upon the construction of the last-mentioned law, taken in connection with the act of 1785.

The act of 1792, which extends the charter of this bridge, incorporates another company to build a bridge over Charles River; furnishing another communication with Boston, and distant only between one and two miles from the old bridge.

The first six sections of this act incorporate the proprietors of the West Boston bridge, and define the privileges and describe the duties of that corporation. In the seventh section there is the following recital: "And whereas the erection of Charles River bridge was a work of hazard and public utility, and another bridge in the place of West Boston bridge may diminish the emoluments of Charles River bridge; therefore, for the encouragement of enterprise," they proceed to extend the charter of the Charles River bridge, and to continue it for the term of seventy years from the day the bridge was completed, subject to the conditions prescribed in the original act, and to be entitled to the same tolls. It appears, then, that by the same act that extended this charter the legislature established another bridge, which they knew would lessen its profits; and this, too, before the expiration of the first charter, and only seven years after it was granted; thereby showing that

the State did not suppose that, by the terms it had used in the first law, it had deprived itself of the power of making such public improvements as might impair the profits of the Charles River bridge; and from the language used in the clauses of the law by which the charter is extended it would seem that the legislature were especially careful to exclude any inference that the extension was made upon the ground of compromise with the bridge company, or as a compensation for rights impaired.

On the contrary, words are cautiously employed to exclude that conclusion; and the extension is declared to be granted as a reward for the hazard they had run, and "for the encouragement of enterprise." The extension was given because the company had undertaken and executed a work of doubtful success, and the improvements which the legislature then contemplated might diminish the emoluments they had expected to receive from it. It results from this statement that the legislature in the very law extending the charter asserts its rights to authorize improvements over Charles River which would take off a portion of the travel from this bridge and diminish its profits; and the bridge company accept the renewal thus given and thus carefully connected with this assertion of the right on the part of the State. Can they, when holding their corporate existence under this law, and deriving their franchises altogether from it, add to the privileges expressed in their charter an implied agreement, which is in direct conflict with a portion of the law from which they derive their corporate existence? Can the legislature be presumed to have taken upon themselves an implied obligation, contrary to its own acts and declarations contained in the same law? It would be difficult to find a case justifying such an implication, even between individuals; still less will it be found where sovereign rights are concerned, and where the interests of a whole community would be deeply affected by such an implication. It would, indeed, be a strong exertion of judicial power, acting upon its own views of what justice required and the parties ought to have done, to raise, by a sort of judicial coercion, an implied contract, and infer it from the nature of the very instrument in which the legislature appear to have taken pains to use words which disavow and repudiate any intention, on the part of the State, to make such a contract.

Indeed, the practice and usage of almost every State in the Union, old enough to have commenced the work of internal improvement, is opposed to the doctrine contended for on the part of the plaintiffs in error. Turnpike roads have been made in succession on the same line of travel, the later ones interfering materially with the profits of the first. These corporations have,

in some instances, been utterly ruined by the introduction of newer and better modes of transportation and travelling. In some cases, railroads have rendered the turnpike roads on the same line of travel so entirely useless that the franchise of the turnpike corporation is not worth preserving. Yet in none of these cases have the corporation supposed that their privileges were invaded, or any contract violated on the part of the State. Amid the multitude of cases which have occurred, and have been daily occurring for the last forty or fifty years, this is the first instance in which such an implied contract has been contended for, and this court called upon to infer it from an ordinary act of incorporation, containing nothing more than the usual stipulations and provisions to be found in every such law. The absence of any such controversy, when there must have been so many occasions to give rise to it, proves that neither States, nor individuals, nor corporations ever imagined that such a contract could be implied from such charters. It shows that the men who voted for these laws never imagined that they were forming such a contract; and if we maintain that they have made it, we must create it by a legal fiction, in opposition to the truth of the fact, and the obvious intention of the party. We cannot deal thus with the rights reserved to the States, and by legal intendments and mere technical reasoning take away from them any portion of that power over their own internal police and improvement which is so necessary to their well-being and prosperity.

Dec. | And what would be the fruits of this doctrine of implied contracts on the part of the States, and of property in a line of travel by a corporation, if it should now be sanctioned by this court? To what results would it lead us? If it is to be found in the charter to this bridge, the same process of reasoning must discover it in the various acts which have been passed within the last forty years for turnpike companies. And what is to be the extent of the privileges of exclusion on the different sides of the road? The counsel who have so ably argued this case have not attempted to define it by any certain boundaries. How far must the new improvement be distant from the old one? How near may you approach without invading its rights in the privileged line? If this court should establish the principles now contended for, what is to become of the numerous railroads established on the same line of travel with turnpike companies, and which have rendered the franchises of the turnpike corporations of no value? Let it once be understood that such charters carry with them these implied contracts, and give this unknown and undefined property in a line of travelling, and you will soon find the old turnpike corporations awakening from their sleep, and calling upon this court

to put down the improvements which have taken their place. The millions of property which have been invested in railroads and canals upon lines of travel which had been before occupied by turnpike corporations will be put in jeopardy. We shall be thrown back to the improvements of the last century, and obliged to stand still, until the claims of the old turnpike corporations shall be satisfied, and they shall consent to permit these States to avail themselves of the lights of modern science, and to partake of the benefit of those improvements which are now adding to the wealth and prosperity, and the convenience and comfort, of every other part of the civilized world. Nor is this all. This court will find itself compelled to fix, by some arbitrary rule, the width of this new kind of property in a line of travel; for if such a right of property exists, we have no lights to guide us in marking out its extent, unless, indeed, we resort to the old feudal grants and to the exclusive rights of ferries, by prescription, between towns, and are prepared to decide that when a turnpike road from one town to another had been made no railroad or canal between these two points could afterward be established. This court are not prepared to sanction principles which must lead to such results.

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Many other questions of the deepest importance have been raised and elaborately discussed in the argument. It is not necessary, for the decision of this case, to express our opinion upon them; and the court deem it proper to avoid volunteering an opinion on any question, involving the construction of the Constitution, where the case itself does not bring the question directly before them, and make it their duty to decide upon it.

Some questions also of a purely technical character have been made and argued as to the form of proceeding and the right to relief. But enough appears on the record to bring out the great question in contest; and it is the interest of all parties concerned that the real controversy should be settled without further delay; and as the opinion of the court is pronounced on the main question in dispute here, and disposes of the whole case, it is altogether unnecessary to enter upon the examination of the forms of proceeding in which the parties have brought it before the court.

The judgment of the Supreme Judicial Court of the commonwealth of Massachusetts, dismissing the plaintiffs' bill, must, therefore, be affirmed, with costs.

THE WEST RIVER BRIDGE COMPANY, PLAINTIFFS IN
ERROR, *v.* JOSEPH DIX *et al.*, DEFENDANTS
IN ERROR.

IN THE SUPREME COURT OF THE UNITED STATES, JANUARY
TERM, 1848.

[*Reported in 6 Howard 507.*]

Webster and Collamer for the plaintiffs in error.

Phelps for defendants in error.

DANIEL, J., delivered the opinion of the court.¹

The West River Bridge Company, Plaintiffs, *v.* Joseph Dix and the Towns of Brattleborough and Dummerston, Defendants, upon a writ of error to the Supreme Court of Judicature of the State of Vermont, sitting in certain proceedings as a court of law, and

The same Plaintiffs *v.* The Towns of Brattleborough and Dummerston, and Joseph Dix, Asa Boyden, and Phineas Underwood, upon a writ of error to the Supreme Court of Judicature, and to the Chancellor of the First Circuit of the State of Vermont.

These two causes have been treated in the argument as one—and such they essentially are. Though prosecuted in different forms and in different forums below, they are merely various modes of endeavoring to attain the same end, and a decision in either of the only question they raise for the cognizance of this court disposes equally of that question in the other.

They are brought before us under the twenty-fifth section of the Judiciary Act, in order to test the conformity with the Constitution of the United States of certain statutes of Vermont; laws that have been sustained by the Supreme Court of Vermont, but which it is alleged are repugnant to the tenth section of the first article of the Constitution, prohibiting the passage of State laws impairing the obligation of contracts.

It appears from the records of these causes that in the year 1795 the plaintiffs in error were, by act of the legislature of Vermont, created a corporation, and invested with the exclusive privilege of erecting a bridge over West River, within four miles of its mouth, and with the right of taking tolls for passing the same. The franchise granted this corporation was to continue for one hundred years, and the period originally prescribed for its duration has not yet expired. The corporation erected their bridge, have maintained and used it, and enjoyed the franchise granted to

¹ The statement of facts has been omitted.—Ed.

them by law, until the institution of the proceeding now under review.

By the general law of Vermont relating to roads, passed November 19, 1839 (*vide* Revised Laws of Vermont, p. 553), the county courts are authorized, upon petition, to appoint commissioners to lay out highways within their respective counties, and to assess the damages which may accrue to landholders by the opening of roads, and these courts, upon the reports of the commissioners so appointed, are empowered to establish roads within the bounds of their local jurisdiction. A similar power is vested in the Supreme Court to lay out and establish highways extending through several counties.

By an act of the legislature of Vermont, passed November 19, 1839, it is declared that "whenever there shall be occasion for any new highway in any town or towns of this State, the Supreme and County Courts shall have the same power to take any real estate, easement, or franchise of any turnpike or other corporation, when in their judgment the public good requires a public highway, which such courts now have, by the laws of the State, to lay out highways over individual or private property; and the same power is granted, and the same rules shall be observed, in making compensation to all such corporations and persons whose estates, easement, franchise, or rights shall be taken, as are now granted and provided in other cases." Under the authority of these statutes, and in the modes therein prescribed, a proceeding was instituted in the County Court of Windham, upon the petition of Joseph Dix and others, in which, by the judgment of that court, a public road was extended and established between certain termini, passing over and upon the bridge of the plaintiffs, and converting it into a free public highway. By the proceedings and judgment just mentioned, compensation was assessed and awarded to the plaintiffs for this appropriation of their property, and for the consequent extinguishment of their franchise. The judgment of the County Court, having been carried by certiorari before the Supreme Court of the State, was by the latter tribunal affirmed.

Pending the proceedings at law upon the petition of Dix and others, a bill was presented by the plaintiffs in error to the chancellor of the First Judicial Circuit of the State of Vermont, praying an injunction to those proceedings so far as they related to the plaintiffs or to the real estate, easement, or franchise belonging to them. This bill, having been demurred to, was dismissed by the chancellor, whose decree was affirmed on appeal to the Supreme Court, and a writ of error to the last decision brings up the case on the second record.

In considering the question propounded in these causes, there can be no doubt, nor has it been doubted in argument, on either side of this controversy, that the charter of incorporation granted to the plaintiffs in 1793, with the rights and privileges it declared or implied, formed a contract between the plaintiffs and the State of Vermont, which the latter, under the inhibition in the tenth section of the first article of the Constitution, could have no power to impair. Yet this proposition, though taken as a postulate on both sides, determines nothing as to the real merits of these causes. True, it furnishes a guide to our inquiries, yet leaves those inquiries still open, in their widest extent, as to the real position of the parties with reference to the State legislation or to the Constitution. Following the guide thus furnished us, we will proceed to ascertain that position. No State, it is declared, shall pass a law impairing the obligation of contracts; yet, with this concession constantly yielded, it cannot be justly disputed that in every political sovereign community there inheres necessarily the right and the duty of guarding its own existence, and of protecting and promoting the interests and welfare of the community at large. This power and this duty are to be exerted not only in the highest acts of sovereignty, and in the external relations of governments; they reach and comprehend likewise the interior polity and relations of social life, which should be regulated with reference to the advantage of the whole society. This power, denominated the *eminent domain* of the State, is, as its name imports, paramount to all private rights vested under the government, and these last are, by necessary implication, held in subordination to this power, and must yield in every instance to its proper exercise.

The Constitution of the United States, although adopted by the sovereign States of this Union, and proclaimed in its own language to be the supreme law for their government, can, by no rational interpretation, be brought to conflict with this attribute in the States; there is no express delegation of it by the Constitution; and it would imply an incredible fatuity in the States to ascribe to them the intention to relinquish the power of self-government and self-preservation. A correct view of this matter must demonstrate, moreover, that the right of eminent domain in government in nowise interferes with the inviolability of contracts; that the most sanctimonious regard for the one is perfectly consistent with the possession and exercise of the other.

Under every established government, the tenure of property is derived mediately or immediately from the sovereign power of the political body, organized in such mode or exerted in such way as the community or State may have thought proper to ordain. It

can rest on no other foundation, can have no other guarantee. It is owing to these characteristics only, in the original nature of tenure, that appeals can be made to the laws either for the protection or assertion of the rights of property. Upon any other hypothesis the law of property would be simply the law of force. Now it is undeniable that the investment of property in the citizen by the government, whether made for a pecuniary consideration or founded on conditions of civil or political duty, is a contract between the State, or the government acting as its agent, and the grantee; and both the parties thereto are bound in good faith to fulfil it. But into all contracts, whether made between States and individuals or between individuals only, there enter conditions which arise not out of the literal terms of the contract itself; they are superinduced by the pre-existing and higher authority of the laws of nature, of nations, or of the community to which the parties belong; they are always presumed, and must be presumed, to be known and recognized by all, are binding upon all, and need never, therefore, be carried into express stipulation, for this could add nothing to their force. Every contract is made in subordination to them, and must yield to their control, as conditions inherent and paramount, wherever a necessity for their execution shall occur. Such a condition is the right of eminent domain. This right does not operate to impair the contract effected by it, but recognizes its obligation in the fullest extent, claiming only the fulfilment of an essential and inseparable condition. Thus, in claiming the resumption or qualification of an investiture, it insists merely on the true nature and character of the right invested. The impairing of contracts inhibited by the Constitution can scarcely, by the greatest violence of construction, be made applicable to the enforcing of the terms or necessary import of a contract; the language and meaning of the inhibition were designed to embrace proceedings attempting the interpolation of some new term or condition foreign to the original agreement, and therefore inconsistent with and violative thereof. It, then, being clear that the power in question not being within the purview of the restriction imposed by the tenth section of the first article of the Constitution, it remains with the States to the full extent in which it inheres in every sovereign government to be exercised by them in that degree that shall by them be deemed commensurate with public necessity. So long as they shall steer clear of the single predicament denounced by the Constitution, shall avoid interference with the obligation of contracts, the wisdom, the modes, the policy, the hardship of any exertion of this power are subjects not within the proper cognizance of this court. This is, in truth, purely a question of power; and, conced-

ing the power to reside in the State government, this concession would seem to close the door upon all further controversy in connection with it. The instances of the exertion of this power, in some mode or other, from the very foundation of civil government, have been so numerous and familiar that it seems somewhat strange at this day to raise a doubt or question concerning it. In fact, the whole policy of the country, relative to roads, mills, bridges, and canals, rests upon this single power, under which lands have been always condemned; and without the exertion of this power not one of the improvements just mentioned could be constructed. In our country it is believed that the power was never, or, at any rate, rarely, questioned, until the opinion seems to have obtained that the right of property in a chartered corporation was more sacred and intangible than the same right could possibly be in the person of the citizen; an opinion which must be without any grounds to rest upon, until it can be demonstrated either that the ideal creature is more than a person, or the corporeal being is less. For, as a question of the power to appropriate to public uses the property of private persons, resting upon the ordinary foundations of private right, there would seem to be room neither for doubt nor difficulty. A distinction has been attempted, in argument, between the power of a government to appropriate for public uses property which is corporeal, or may be said to be in being, and the like power in the government to resume or extinguish a franchise. The distinction thus attempted we regard as a refinement which has no foundation in reason, and one that, in truth, avoids the true legal or constitutional question in these causes—namely, that of the right in private persons, in the use or enjoyment of their private property, to control and actually to prohibit the power and duty of the government to advance and protect the general good. We are aware of nothing peculiar to a franchise which can class it higher, or render it more sacred, than other property. A franchise is property, and nothing more; it is incorporeal property, and is so defined by Justice Blackstone, when treating, in his second volume, c. 3, p. 20, of the Rights of Things. It is its character of property only which imparts to it value, and alone authorizes in individuals a right of action for invasions or disturbances of its enjoyment. *Vide* Bl. Comm., Vol. III., c. 16, p. 236, as to injuries to this description of private property, and the remedies given for redressing them. A franchise, therefore, to erect a bridge, to construct a road, to keep a ferry, and to collect tolls upon them, granted by the authority of the State, we regard as occupying the same position, with respect to the paramount power and duty of the State to promote and protect the public good, as does the right of the citizen to the possession

and enjoyment of his land under his patent or contract with the State, and it can no more interpose any obstruction in the way of their just exertion. Such exertion we hold to be not within the inhibition of the Constitution, and no violation of a contract. The power of a State, in the exercise of eminent domain, to extinguish immediately a franchise it had granted, appears never to have been directly brought here for adjudication, and consequently has not been heretofore formally propounded from this court; but in England this power, to the fullest extent, was recognized in the case of the Governor and Company of the Cast Plate Manufacturers *v.* Meredith, 4 Term Reports, 794, and Lord Kenyon, especially in that case, founded solely upon this power the entire policy and authority of all the road and canal laws of the kingdom.

The several State decisions cited in the argument, from 3 Paige's Chancery Reports, p. 45, from 23 Pickering, p. 361, from 17 Connecticut Reports, p. 454, from 8 New Hampshire Reports, p. 398, from 10 New Hampshire Reports, p. 371, and 11 New Hampshire Reports, p. 20, are accordant with the decision above mentioned, from 4 Durnford and East, and entirely supported by it. One of these State decisions—namely, the case of the Enfield Toll-Bridge Company *v.* The Hartford and New Haven Railroad Company, 17 Connecticut Reports—places the principle asserted in an attitude so striking as seems to render that case worthy of a separate notice. The legislature of Connecticut, having previously incorporated the Enfield Bridge Company, inserted, in a charter subsequently granted by them to the Hartford and Springfield Railroad Company, a provision in these words: "That nothing therein contained shall be construed to prejudice or impair any of the rights now vested in the Enfield Bridge Company." This provision, comprehensive as its language may seem to be, was decided by the Supreme Court of the State as not embracing any exemption of the Bridge Company from the legislative power of eminent domain, with respect to its franchise, but to declare this, and this only: that, notwithstanding the privilege of constructing a railroad from Hartford to Springfield in the most direct and feasible route, granted by the latter charter, the franchise of the Enfield Bridge Company should remain as inviolate as the property of other citizens of the State. These decisions sustain clearly the following positions, comprised in this summary given by Chancellor Walworth, 3 Paige's Reports, p. 73, where he says that "notwithstanding the grant to individuals, the eminent domain, the highest and most exact idea of property, remains in the government, or in the aggregate body of the people in their sovereign capacity; and they have a right to resume the possession of the property in the manner directed by the Constitu-

tion and laws of the State, whenever the public interest requires it. This right of resumption may be exercised, not only where the safety, but also where the interest, or even the expediency, of the State is concerned." In these positions, containing no exception with regard to property in a franchise (an exception which we should deem to be without warrant in reason), we recognize the true doctrines of the law as applicable to the cases before us. In considering the question of constitutional power—the only question properly presented upon these records—we institute no inquiry as to the adequacy or inadequacy of the compensation allowed to the plaintiffs in error for the extinguishment of their franchise; nor do we inquire into the conformity between the modes prescribed by the statutes of Vermont and the proceedings which actually were adopted in the execution of those statutes; these are matters regarded by this court as peculiarly belonging to the tribunals designated by the State for the exercise of her legitimate authority, and as being without the province assigned to this court by the Judiciary Act.

Upon the whole, we consider the authority claimed for the State of Vermont, and the exertion of that authority which has occurred under the provisions of the statutes above mentioned, by the extinguishment of the franchise previously granted the plaintiffs, as set forth upon the records before us, as presenting no instance of the impairing of a contract within the meaning of the tenth section of the first article of the Constitution, and consequently no case which is proper for the interposition of this court. The decisions of the Supreme Court of Vermont are therefore affirmed.¹

STONE *v.* MISSISSIPPI.

IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM,
1879.

[*Reported in 101 United States Reports 814.*]

ERROR to the Supreme Court of the State of Mississippi.

The legislature of Mississippi passed an act, approved February 16, 1867, entitled "An Act incorporating the Mississippi Agricultural and Manufacturing Aid Society." Its provisions, so far as they bear upon the questions involved, are as follows:

"The corporation shall have power to receive subscriptions, and sell and dispose of certificates of subscriptions which shall

¹ The opinion of McLean and Woodbury, JJ., concurring in the judgment, and the dissenting opinion of Wayne, J., have been omitted.—Ed.

entitle the holders thereof to any articles that may be awarded to them, and the distribution of the awards shall be fairly made in public, after advertising, *by the casting of lots, or by lot, chance, or otherwise*, in such manner as shall be directed by the by-laws of said corporation; . . . and the said corporation shall have power to offer premiums or prizes in money for the best essays on agriculture, manufactures, and education, written by a citizen of Mississippi, or to the most deserving works of art executed by citizens of Mississippi, or the most useful inventions in mechanics, science, or art, made by citizens of Mississippi."

Sec. 7 provides that the articles to be distributed or awarded may consist of lands, books, paintings, statues, antiques, scientific instruments or apparatus, or any other property or thing that may be ornamental, valuable, or useful.

Sec. 8 requires the corporation to pay, before the commencement of business, to the Treasurer of the State, for the use of the University, the sum of \$5000, and to give bond and security for the annual payment of \$1000, together with one-half per cent. on the amount of receipts derived from the sale of certificates.

Sec. 9 declares that any neglect or refusal to comply with the provisions of the act shall work a forfeiture of all the privileges granted, and subject any officer or agent failing to carry out its provisions or committing any fraud in selling tickets at drawing of lottery to indictment, the penalty being a "fine not less than \$1000, and imprisonment not less than six months."

Sec. 11 enacts that as soon as the sum of \$100,000 is subscribed, and the sum of \$25,000 paid into the capital stock, the company shall go into operation under their charter and not before, and the act of incorporation shall continue and be in force for the space of twenty-five years from its passage, and that all laws and parts of laws in conflict with its provisions be repealed, and that the act shall take effect from and after its passage.

The Constitution of the State, adopted in convention May 15, 1868, and ratified by the people December 1, 1869, declares that "the legislature shall never authorize any lottery; nor shall the sale of lottery-tickets be allowed; nor shall any lottery heretofore authorized be permitted to be drawn, or tickets therein to be sold." The legislature passed an act, approved July 16, 1870, entitled "An Act enforcing the provisions of the Constitution of the State of Mississippi, prohibiting all kinds of lotteries within said State, and making it unlawful to conduct one in this State."

The Attorney-General of Mississippi filed, March 17, 1874, in the Circuit Court of Warren County in that State, an information in the nature of a *quo warranto*, against John B. Stone and others, alleging that, without authority or warrant of law, they were then,

and for the preceding twelve months had been, carrying on a lottery or gift enterprise within said county and State under the name of "The Mississippi Agricultural, Educational, and Manufacturing Aid Society." The information alleges that said society obtained from the legislature a charter, but sets up the aforesaid constitutional provision and the act of July 16, 1870, and avers that the charter was thereby virtually and in effect repealed.

By their answer the respondents admit that they were carrying on a lottery enterprise under the name mentioned. They aver that in so doing they were exercising the rights, privileges, and franchises conferred by their charter, and that they have in all things complied with its provisions. They further aver that their rights and franchises were not impaired by the constitutional provision and legislative enactment aforesaid.

The State replied to the answer by admitting that the respondents had in every particular conformed to the provisions of their charter.

The court, holding that the act of incorporation had been abrogated and annulled by the Constitution of 1868 and the legislation of July 16, 1870, adjudged that the respondents be ousted of and from all the liberties and privileges, franchises and emoluments, exercised by them under and by virtue of the said act.

The judgment was, on error, affirmed by the Supreme Court, and Stone and others sued out this writ.

Philip Phillips for the plaintiffs in error.

A. M. Clayton and Van H. Manning for the defendant in error.

WAITE, Ch. J., delivered the opinion of the court.

It is now too late to contend that any contract which a State actually enters into when granting a charter to a private corporation is not within the protection of the clause in the Constitution of the United States that prohibits States from passing laws impairing the obligation of contracts. Art. 1, sec. 10. The doctrines of *Trustees of Dartmouth College v. Woodward*, 4 Wheat. 518, announced by this court more than sixty years ago, have become so imbedded in the jurisprudence of the United States as to make them to all intents and purposes a part of the Constitution itself. In this connection, however, it is to be kept in mind that it is not the charter which is protected, but only any contract the charter may contain. If there is no contract, there is nothing in the grant on which the Constitution can act. Consequently, the first inquiry in this class of cases always is whether a contract has in fact been entered into, and if so, what its obligations are.

In the present case the question is whether the State of Mississippi, in its sovereign capacity, did by the charter now under consideration bind itself irrevocably by a contract to permit "the

Mississippi Agricultural, Educational, and Manufacturing Aid Society," for twenty-five years, "to receive subscriptions, and sell and dispose of certificates of subscription which shall entitle the holders thereof to "any lands, books, paintings, antiques, scientific instruments or apparatus, or any other property or thing that may be ornamental, valuable, or useful," "awarded to them" "by the casting of lots, or by lot, chance, or otherwise." There can be no dispute but that under this form of words the legislature of the State chartered a lottery company, having all the powers incident to such a corporation, for twenty-five years, and that in consideration thereof the company paid into the State treasury \$5000 for the use of a university, and agreed to pay, and until the commencement of this suit did pay, an annual tax of \$1000 and "one-half of one per cent. on the amount of receipts derived from the sale of certificates or tickets." If the legislature that granted this charter had the power to bind the people of the State and all succeeding legislatures to allow the corporation to continue its corporate business during the whole term of its authorized existence, there is no doubt about the sufficiency of the language employed to effect that object, although there was an evident purpose to conceal the vice of the transaction by the phrases that were used. Whether the alleged contract exists, therefore, or not, depends on the authority of the legislature to bind the State and the people of the State in that way.

All agree that the legislature cannot bargain away the police power of a State. "Irrevocable grants of property and franchises may be made if they do not impair the supreme authority to make laws for the right government of the State; but no legislature can curtail the power of its successors to make such laws as they may deem proper in matters of police." *Metropolitan Board of Excise v. Barrie*, 34 N. Y. 657; *Boyd v. Alabama*, 94 U. S. 645. Many attempts have been made in this court and elsewhere to define the police power, but never with entire success. It is always easier to determine whether a particular case comes within the general scope of the power than to give an abstract definition of the power itself which will be in all respects accurate. No one denies, however, that it extends to all matters affecting the public health or the public morals. *Beer Company v. Massachusetts*, 97 *id.* 25; *Patterson v. Kentucky*, *id.* 501. Neither can it be denied that lotteries are proper subjects for the exercise of this power. We are aware that formerly, when the sources of public revenue were fewer than now, they were used in some or all of the States, and even in the District of Columbia, to raise money for the erection of public buildings, making public improvements, and not unfrequently for educational and religious purposes; but this court

said, more than thirty years ago, speaking through Mr. Justice Grier, in *Phalen v. Virginia*, 8 How. 163, 168, that "experience has shown that the common forms of gambling are comparatively innocuous when placed in contrast with the widespread pestilence of lotteries. The former are confined to a few persons and places, but the latter infests the whole community; it enters every dwelling; it reaches every class; it preys upon the hard earnings of the poor; and it plunders the ignorant and simple." Happily, under the influence of restrictive legislation, the evils are not so apparent now; but we very much fear that with the same opportunities of indulgence the same results would be manifested.

If lotteries are to be tolerated at all, it is no doubt better that they should be regulated by law, so that the people may be protected as far as possible against the inherent vices of the system; but that they are demoralizing in their effects, no matter how carefully regulated, cannot admit of a doubt. When the government is untrammelled by any claim of vested rights or chartered privileges, no one has ever supposed that lotteries could not lawfully be suppressed, and those who manage them punished severely as violators of the rules of social morality. From 1822 to 1867, without any constitutional requirement, they were prohibited by law in Mississippi, and those who conducted them punished as a kind of gamblers. During the provisional government of that State, in 1867, at the close of the late Civil War, the present act of incorporation, with more of like character, was passed. The next year, 1868, the people, in adopting a new Constitution with a view to the resumption of their political rights as one of the United States, provided that "the legislature shall never authorize any lottery, nor shall the sale of lottery-tickets be allowed, nor shall any lottery heretofore authorized be permitted to be drawn, or tickets therein to be sold." Art. 12, sec. 15. There is now scarcely a State in the Union where lotteries are tolerated, and Congress has enacted a special statute, the object of which is to close the mails against them. Rev. Stat., sec. 3894; 19 Stat. 90, sec. 2.

R | The question is therefore directly presented, whether, in view of these facts, the legislature of a State can, by the charter of a lottery company, defeat the will of the people, authoritatively expressed, in relation to the further continuance of such business in their midst. We think it cannot. / No legislature can bargain away the public health or the public morals. The people themselves cannot do it, much less their servants. // The supervision of both these subjects of governmental power is continuing in its nature, and they are to be dealt with as the special exigencies of the moment may require. Government is organized with a view

to their preservation, and cannot divest itself of the power to provide for them. For this purpose the largest legislative discretion is allowed, and the discretion cannot be parted with any more than the power itself. *Beer Company v. Massachusetts*, *supra*.

In *Trustees of Dartmouth College v. Woodward*, 4 Wheat. 518, it was argued that the contract clause of the Constitution, if given the effect contended for in respect to corporate franchises, "would be an unprofitable and vexatious interference with the internal concerns of a State, would unnecessarily and unwisely embarrass its legislation, and render immutable those civil institutions which are established for the purpose of internal government, and which, to subserve those purposes, ought to vary with varying circumstances" (p. 628); but Marshall, Ch. J., when he announced the opinion of the court, was careful to say (p. 629) "that the framers of the Constitution did not intend to restrain States in the regulation of their civil institutions, adopted for internal government, and that the instrument they have given us is not to be so construed." The present case, we think, comes within this limitation. We have held, not, however, without strong opposition at times, that this clause protected a corporation in its charter exemptions from taxation. While taxation is in general necessary for the support of government, it is not part of the government itself. Government was not organized for the purposes of taxation, but taxation may be necessary for the purposes of government. As such, taxation becomes an incident to the exercise of the legitimate functions of government, but nothing more. No government dependent on taxation for support can bargain away its whole power of taxation, for that would be substantially abdication. All that has been determined thus far is that for a consideration it may, in the exercise of a reasonable discretion, and for the public good, surrender a part of its powers in this particular.

But the power of governing is a trust committed by the people to the government, no part of which can be granted away. The people, in their sovereign capacity, have established their agencies for the preservation of the public health and the public morals, and the protection of public and private rights. These several agencies can govern according to their discretion, if within the scope of their general authority, while in power; but they cannot give away nor sell the discretion of those that are to come after them, in respect to matters the government of which, from the very nature of things, must "vary with varying circumstances." They may create corporations, and give them, so to speak, a limited citizenship; but as citizens, limited in their privileges, or

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otherwise, these creatures of the government creation are subject to such rules and regulations as may from time to time be ordained and established for the preservation of health and morality.

R. The contracts which the Constitution protects are those that relate to property rights, not governmental. It is not always easy to tell on which side of the line which separates governmental from property rights a particular case is to be put; but in respect to lotteries there can be no difficulty. They are not, in the legal acceptance of the term, *mala in se*, but, as we have just seen, may properly be made *mala prohibita*. They are a species of gambling, and wrong in their influences. They disturb the checks and balances of a well-ordered community. Society built on such a foundation would almost of necessity bring forth a population of speculators and gamblers, living on the expectation of what, "by the casting of lots, or by lot, chance, or otherwise," might be "awarded" to them from the accumulations of others. // Certainly the right to suppress them is governmental, to be exercised at all times by those in power, at their discretion. Any one, therefore, who accepts a lottery charter does so with the implied understanding that the people, in their sovereign capacity, and through their properly constituted agencies, may resume it at any time when the public good shall require, whether it be paid for or not. All that one can get by such a charter is a suspension of certain governmental rights in his favor, subject to withdrawal at will. He has in legal effect nothing more than a license to enjoy the privilege on the terms named for the specified time, unless it be sooner abrogated by the sovereign power of the State. It is a permit, good as against existing laws, but subject to future legislative and constitutional control or withdrawal.

On the whole we find no error in the record.

Judgment affirmed.

CITY OF DETROIT v. DETROIT AND HOWELL
PLANK-ROAD COMPANY.

IN THE SUPREME COURT OF MICHIGAN, APRIL 7, 1880.

[Reported in 43 Michigan Reports 140.]

F. A. Baker, E. F. Conely and Otto Kirchner for relator.

Chas. A. Kent and G. V. N. Lothrop for respondent.

COOLEY, J. A mandamus is applied for in this case to compel the respondent to remove beyond the city limits a toll-gate

located on Grand River Street. The questions the application presents are questions of statutory construction and of constitutional law.

The respondent was incorporated April 3, 1848, for the purpose of building and maintaining a plank road from the city of Detroit to the village of Howell, with certain specified branches. The third section of the act of incorporation provided that the corporation "shall be subject to the provisions of an act entitled 'An Act relative to plank roads,' approved March 13, 1848, except so far as otherwise provided in this act." The fifth section was as follows: "This act shall be and remain in force for the term of sixty years from and after its passage; but the legislature may at any time alter, amend, or repeal this act by a vote of two-thirds of each branch thereof; but such alteration, amendment, or repeal shall not be made within thirty years of the passage of this act, unless it shall be made to appear to the legislature that there has been a violation by the company of some of the provisions of this act: *Provided*, That after said thirty years, no alteration or reduction of the tolls of said company shall be made during its existence unless the yearly net profits of said company, over and above all expenses, shall exceed ten per cent. on the capital stock invested, provided there be no violation of the charter of said company." Laws 1848, p. 398.

*act -
charter*

This act of incorporation was one of a considerable number passed by the same legislature, all very short, and doing little beyond fixing the line of the proposed road and the period of corporate existence, but referring for all other directions to the "Act relative to plank roads," subject to the provisions of which they were all made. That act prescribed a method of organization, enumerated the corporate powers and franchises, provided for an annual report to the Secretary of State, prescribed rates of toll, and limited the imposition of taxes. Laws 1848, p. 59.

Several sections of the general act of 1848 were amended in 1853, and several new sections were added. One of the new sections was as follows: "Any plank-road company, organized under the provisions of this act, shall be subject to the provisions of all amendments made or to be made thereto, whenever the assent of any such company, certified by the president and secretary thereof, to the provisions of such amendments shall be filed in the office of the Secretary of State." Laws 1853, p. 69. The respondent filed its assent to these amendments, and no question is made of its being bound thereby.

*provides for
amendments.*

In 1879 a further section was added to the general act of 1848 as follows: "No plank-road company organized subject to the provisions of this act shall, without the consent of the local au-

thorities, keep or maintain a toll-gate within the present or future corporate limits of any city, or village; and no such company shall collect toll for any portion of its road, within such limits, on which a pavement is maintained by such municipality. The assent of any such company to this amendment shall not be necessary in order to make this act applicable to such company. And if any plank-road company or companies in this State are, at the time of the passage of this act, maintaining any toll-gate within the present corporate limits of any city or village, said plank-road company or companies are hereby required to discontinue and remove said toll-gate beyond the limits of said city or village, within sixty days after they are notified by the municipal authorities to so discontinue or remove the same." Public Laws 1879, p. 197.

It is upon this last amendment that the questions in this case arise. The toll-gate of the respondent on Grand River Street is within the existing corporate limits of the city of Detroit, and the city authorities notified the respondent to discontinue and remove the same more than sixty days before this proceeding was instituted. The respondent denies the validity of the act of 1879, and refuses to conform to it. It is admitted that but for the act of 1879 respondent might lawfully maintain the gate where it is, the city having been extended to embrace it since the gate was located. *Chope v. Detroit & Howell P. R. Co.*, 37 Mich. 195.

The effect of this legislation, if valid, would be to take from respondent about two miles and a half of the road upon which it now collects toll. It is not pretended that this is done by reason of any forfeiture done or suffered by the respondent, and if it were, a judicial finding would be necessary. *Flint, etc., Plank-Road Co. v. Woodhull*, 25 Mich. 99. Nor is it claimed that the act of 1879 was passed as a regulation of police. It would probably be conceded that it goes quite beyond the competency of an act of mere regulation, and that it must be sustained, if at all, as an act passed in the exercise of that complete power to amend and repeal which was reserved in passing both the general act of 1848 and the charter of respondent. The city relies upon it as an exercise of that power, and not otherwise.

The respondent claims that the act of 1879 is unconstitutional for many reasons; one which is especially relied upon being that it is inconsistent with the act of 1853, by one of the provisions of which subsequent amendments were to be binding on companies which were subject to the provisions of the general plank-road act, when they should file with the Secretary of State their assent thereto. That section, it is insisted, constitutes a contract between the State and the companies, prescribing while it stands the terms and the only terms on which companies can be bound

by amendments, and is irrepealable except as to such companies as may assent. The city insists, on the other hand, that so long as a general power to amend and repeal is reserved, all amendments must themselves be amendable and repealable, and that inconsistent legislation does not repeal them.

If the act of 1879 in what it proposes to accomplish is fairly within the scope of any legitimate power to amend charters, the difficulty raised upon the act of 1853 would probably not be serious. An examination of that act will show that its provisions were amendments for the ease and advantage of plank-road companies; enlarging their powers and capacities, decreasing the taxes to which they would be liable, extending the time within which they might complete their roads, relieving them of penalties, and so on, and that the consent of corporations thereto could not have been required by way of assent to onerous conditions as a consideration for favors conferred. On the contrary, the State could have passed and enforced the act without the provision for assent, and that provision can only be understood as leaving it optional with companies to claim the benefits of the act of 1853 as their interests might seem to dictate. But so far as that act undertook to limit the power to amend in the future—if it can be understood as having done so—it must have been wholly inoperative. A legislative declaration embodied in a particular law, that it shall be binding only on those who may assent to it, may limit the scope of that law, but a declaration that any future law on the same subject shall be thus restricted must be void. *Bloomer v. Stolley*, 5 McLean, 158, 161; *Kellogg v. Oshkosh*, 14 Wis. 623. Legislators cannot thus bind the hands of their successors where the elements of contract, concession, and consideration do not appear; and the doctrine that they may do so by contract is one so exceptional and so liable to abuses that courts will not be astute in discovering the existence of a contract between the State and those who claim franchises under it, where the essential elements of a contract are not manifest. All questions of doubt are to be solved in favor of the State in such cases, and “to be in doubt is to be resolved.” *Pennsylvania R. R. Co. v. Canal Commissioners*, 21 Penn. St. 22; *East Saginaw Salt Manfg. Co. v. East Saginaw*, 19 Mich. 259; *Richmond, etc., R. R. Co. v. Richmond*, 26 Gratt. 83.

But leaving out of view the act of 1853, is the act of 1879 a legitimate exercise of the power to amend the plank-road charters? It has been seen that in the case of this particular company it takes from it about two miles and a half of its road, and this may be and probably is from the most profitable portion of it. That this diminishes essentially the value of the road is not to be doubted, though the extent is immaterial.

There are cases in which amendments to charters having some resemblance to this have been sustained, but it is in general easy to distinguish them. Many of these are cited in the brief for the relator. *Commissioners v. Holyoke Co.*, 104 Mass. 446, in which a company having a dam across the Connecticut River was required to construct a fish-way, was a case involving a mere police regulation for the preservation of rights of others in the fishery above and below. All the following cases involved the same principle: *Commonwealth v. Eastern R. R. Co.*, 103 Mass. 254, where a railroad company was required to build a station house and stop its trains at a certain locality; *Albany, etc., R. R. Co. v. Brownell*, 24 N. Y. 345, in which it was held competent to require a railroad company to permit and provide for the crossing of its track by highways; *Roxbury v. Boston R. R. Co.*, 6 Cush. 424, in which a like question was involved; *English v. New Haven, etc., Co.*, 32 Conn. 240, in which a bridge, made necessary for the convenience of a railroad company, and used by the company and the public, was required to be made wider by the company; *Worcester v. Norwich, etc., R. R. Co.*, 109 Mass. 103, in which the railroads coming into a city were required to unite in a common passenger station at a point to be determined by commissioners; *Meadow Dam Co. v. Gray*, 30 Me. 547, in which a company incorporated to build a dam across a river was required to construct a lock for purposes of navigation; and there are many others of the same sort. Cases involving only the right to change the methods or the extent of taxation may be dismissed altogether from consideration, as this right must always exist when there is no express contract to the contrary. *East Saginaw Salt Manfg. Co. v. East Saginaw*, 13 Wall. 373. So may cases involving only the question of the liability of corporations to the control of the general police laws of the State. *Beer Company v. Massachusetts*, 97 U. S. 25; *Fertilizing Company v. Hyde Park*, *id.* 659.

But there is no well-considered case in which it has been held that a legislature, under its power to amend a charter, might take from the corporation any of its substantial property or property rights. In some cases the power has been denied where the interest involved seemed insignificant. The case of *Albany, etc., R. R. Co. v. Brownell*, 24 N. Y. 345, is an illustration. It was there decided that although the legislature might require railroad companies to suffer highways to cross their tracks, they could not subject the lands which the companies had acquired for other purposes to the same burden except in connection with provision for compensation. The decision was in accord with that in *Commonwealth v. Essex Co.*, 13 Gray, 239, 253, in which, while the power to alter, amend or repeal the corporate franchises was sustained,

it was at the same time declared that "no amendment or alteration of the charter can take away the property or rights which have become vested under a legitimate exercise of the powers granted." The same doctrine is clearly asserted and affirmed in *Railroad Company v. Maine*, 96 U. S. 499, and is assumed to be unquestionable in the several opinions delivered in the *Sinking Fund Cases*, 99 U. S. 700.

But for the provision in the Constitution of the United States which forbids impairing the obligation of contracts, the power to amend and repeal corporate charters would be ample without being expressly reserved. The reservation of the right leaves the State where any sovereignty would be if unrestrained by express constitutional limitations, and with the powers which it would then possess. It might therefore do what it would be admissible for any constitutional government to do when not thus restrained, but it could not do what would be inconsistent with constitutional principles. And it cannot be necessary at this day to enter upon a discussion in denial of the right of the government to take from either individuals or corporations any property which they may rightfully have acquired. In the most arbitrary times such an act was recognized as pure tyranny, and it has been forbidden in England ever since *Magna Charta*, and in this country always. It is immaterial in what way the property was lawfully acquired; whether by labor in the ordinary avocations of life, by gift or descent, or by making profitable use of a franchise granted by the State: it is enough that it has become private property, and it is then protected by the "law of the land." Even municipal corporations, though their charters are in no sense contracts, are protected by the Constitution in the property they rightfully acquire for local purposes, and the State cannot despoil them of it. *Terrett v. Taylor*, 9 Cr. 43; *Pawlet v. Clark*, 9 Cr. 292; *State v. Haben*, 22 Wis. 660; *People v. Common Council*, 28 Mich. 228.

We have said nothing of those cases in which charters have been amended by limiting the tolls that may be taken, as it is conceded by relator that that is not what has been attempted in this case. It was a part of the original contract that the tolls should not be reduced by the State until the annual returns should realize to the stockholders ten per centum annually on their investment, and it is not claimed that that limit has been reached. What the State claims a right to do is to deprive the respondent of the privilege any longer to take tolls for travel and traffic on two miles and a half of its road. If it may do this in respect to one part of the road, it may in respect to any other part. If it may exclude the respondent from Detroit, it may from Howell also, or

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from any township on the line, and a single section of a statute may annihilate the property of respondent altogether. A statute which could have this effect would not be a statute to amend franchises, but a statute to confiscate property; it would not be a statute of regulation, but of spoliation.

It may be that what the legislature of 1879 proposed to accomplish would in itself work no hardship to respondent, and would be highly desirable to the city; but the principle violated is the fundamental principle that underlies all property; and the first successful inroad upon it that obtains judicial sanction may be a precedent that shall let in innumerable evils. Courts must look beyond the particular case to the governing principle, and be governed by that, regardless of temporary and special inconveniences. But even such inconveniences must be trivial, since the power to appropriate private property to public uses is always ample and always at command.

It results, from what has above been said, that the mandamus must be denied.

The other justices concurred.

GREENWOOD *v.* FREIGHT COMPANY.

IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM,
1881.

[Reported in 105 *United States Reports* 13.]

APPEAL from the Circuit Court of the United States for the District of Massachusetts.

The facts are stated in the opinion of the court.

George F. Edmunds, with whom was *Alonzo B. Wentworth*, for the appellant.

Darwin E. Ware and *William G. Russell* for the appellees.

MILLER, J., delivered the opinion of the court.

The appellant, Greenwood, a citizen of the State of New York, brought his bill of complaint against the Union Freight Railroad Company, a corporation established by the laws of Massachusetts; against the Marginal Freight Railroad Company, likewise a Massachusetts corporation; against the city of Boston, its mayor and aldermen by name; and against the directors of the Marginal Freight Railroad Company—all citizens of Massachusetts.

The Union Freight Railroad Company demurred to the bill, and

the demurrer was sustained and the bill dismissed. It is this decree which we are called on to review on appeal taken by complainant.

The case made by the bill is that the Marginal Freight Railroad Company, which we shall hereafter call the Marginal Company, was organized under an act of the legislature of Massachusetts of the date of April 26, 1867, to build and operate a railroad through various streets in the city of Boston, "with all the privileges and subject to all the duties, restrictions, and liabilities set forth in the general laws, which now are or may hereafter be in force, relating to street railway corporations, so far as they are applicable." The right of way of this company for part of its route lay over the line of a railway previously granted to the Commercial Freight Railroad Company, and the Marginal Company, by virtue of a provision in its charter, purchased and paid the Commercial Company for the joint use of its track, so far as it ran through the same streets. Afterward, on May 6, 1872, the legislature of Massachusetts incorporated, by an act of that date, the Union Freight Railroad Company, which, by virtue of its charter and the authority of the board of aldermen of Boston, was authorized to run its track through the same streets and over the same ground covered by the track of the Marginal Company, and to take possession of the track of that and any other street railroad company on payment of compensation. This latter act also repealed the charter of the Marginal Company.

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Secs. 4, 6, and 7 of this act constitute the foundation of complainant's grievance, because they are said to impair the obligation of the contract found in the charter of the Marginal Company, and, as they are short, they are here given verbatim:

"Sec. 4. Said corporation may, within its authorized limits and for the purposes of this act, enter upon and use any part of the tracks of any other street railroad, and may suitably strengthen and improve such tracks; and if the corporations cannot agree upon the manner and conditions of such entry and use, or the compensation to be paid therefor, the same shall be determined in accordance with the provisions of the thirty-eighth section of chapter three hundred and eighty-one of the acts of the year eighteen hundred and seventy-one."

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"Sec. 6. Said corporation shall, within four months from the passage of this act, take the tracks, or any part thereof, of the Marginal Freight Railway Company, subject to the laws relating to the taking of land by railroad companies and the compensation to be made therefor.

"Sec. 7. Chapter one hundred and seventy of the acts of the year eighteen hundred and sixty-seven, entitled 'An Act to incor-

porate the Marginal Freight Railway Company,' and so much of chapter four hundred and sixty-one of the acts of the year eighteen hundred and sixty-nine as relates to said Marginal Freight Railway Company, are hereby repealed."

The bill avers that the Union Freight Railroad Company has been organized, and is about to proceed in such a manner under this act that the Marginal Company will be utterly destroyed, and its several contracts, franchises, rights, easements, and properties will be impaired and destroyed, and the stock of complainant in said company will be destroyed and made valueless, and he will sustain irreparable damage and mischief.

Complainant then alleges that he had requested and urged the directors of the Marginal Company to take steps to assert the rights and franchises of the company against what he believes to be unconstitutional legislation, and that they had declined and refused to do so. He also sets out a vote or resolution of said directors, in which they respond to his demand by saying that the assertion of the rights of the corporation in the State courts is accompanied with so many embarrassments that they decline to attempt it. The prayer of the bill is for an injunction against all the defendants, to prevent these acts so injurious to the rights of the Marginal Freight Railroad Company.

The first ground of demurrer to this bill is that the complainant, whose interest is merely that of a stockholder in the Marginal Company, shows no right to sustain this bill, the object of which is to assert rights that are those of the corporation, which is itself under no disability to sue.

This whole subject was fully considered in the recent opinion of the court in *Hawes v. Oakland*, 104 U. S. 450, in the decision of which we had the benefit of the able argument of counsel in this case, which was argued before that was decided. We refer to that opinion for the principles which must govern this branch of the present case. /It is sufficient to say that this bill presents so strong a case of the total destruction of the corporate existence, and of the annihilation of all corporate powers under the act of 1872, that we think complainant as a stockholder comes within the rule laid down in that opinion, and which authorizes a shareholder to maintain a suit to prevent such a disaster, where the corporation peremptorily refuses to move in the matter.

As none of the defendants is charged with a purpose to exercise any power or to perform any acts not authorized by the terms of the act of May 6, 1872, the remaining question to be decided is, whether the features of that act to which complainant objects in his bill are beyond the power of the legislature of Mas-

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sachusetts, or are forbidden by anything in the Constitution of the United States.

These exercises of power in the statute complained of are divisible into two:

1. The repeal of the charter of the Marginal Company.
2. The authority vested in the Union Company to take its track) for the use of the latter company.

It is the argument of counsel, pressed upon us with much vigor, that the two taken together constitute a transfer of the property of the one corporation to the other, and with it all the corporate franchises, rights, and powers belonging to the elder corporation.

We are not insensible to the force of the argument as thus stated; and we think it must be conceded that, according to the unvarying decisions of this court, the unconditional repeal of the charter of the Marginal Company is void under the Constitution of the United States, as impairing the obligation of the contract made by the acceptance of the charter between the corporators of that company and the State, unless it is made valid by that provision of the General Statutes of Massachusetts, called the reservation clause, concerning acts of incorporation; or unless it falls within some enactment covered by that part of its own charter which makes it "subject to all the duties, restrictions, and liabilities set forth in the general laws, which now are or may hereafter be in force, relating to street railway corporations, so far as they may be applicable."

The first of these reservations of legislative power over corporations is found in sec. 41 of chap. 68 of the General Statutes of Massachusetts, in the following language: "Every act of incorporation passed after the eleventh day of March, in the year one thousand eight hundred and thirty-one, shall be subject to amendment, alteration, or repeal, at the pleasure of the legislature."

It would be difficult to supply language more comprehensive or expressive than this.

Such an act may be amended; that is, it may be changed by additions to its terms or by qualifications of the same. It may be altered by the same power, and it may be repealed. What is it may be repealed? It is the act of incorporation. It is this organic law on which the corporate existence of the company depends which may be repealed, so that it shall cease to be a law; or the legislature may adopt the milder course of amending the law in matters which need amendment, or altering it when it needs substantial change. All this may be done at the pleasure of the legislature. That body need give no reason for its action in

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the matter. The validity of such action does not depend on the necessity for it, or on the soundness of the reasons which prompted it. This expression, "the pleasure of the legislature," is significant, and is not found in many of the similar statutes in other States.

This statute having been the settled law of Massachusetts, and representing her policy on an important subject for nearly fifty years before the incorporation of the Marginal Company, we cannot doubt the authority of the legislature of Massachusetts to repeal that charter. Nor is this seriously questioned by counsel for appellant; and it may, therefore, be assumed that if the repealing clause of the act of May 6, 1872, stood alone, its validity must be conceded. *Crease v. Babcock*, 23 Pick. (Mass.) 334; *Erie & N. E. Railroad Co. v. Casey*, 26 Pa. St. 287; *Pennsylvania College Cases*, 13 Wall. 190; 2 Kent, Com. 306.

It is argued, however, that the act is to be examined as a whole, and that as the earlier sections of the statute bestow upon the Union Company the right to seize the track and other property of the Marginal Company, this repealing clause is inserted merely to aid in the general purpose of transferring a valuable property and its appurtenant franchise from one corporation to another.

Whether this is sufficient to invalidate that branch or feature of the statute may depend somewhat upon the effect of the repealing clause upon the rights of the Marginal Company, as well as upon other matters; but we do not doubt the validity of the repealing clause of that act, whatever may have been the reasons which influenced the legislature to enact it, for the exercise of this power is by express terms declared to be at the pleasure of the legislature.

The forty-first section of chapter 68, as we have cited it, had a proviso, as it was originally enacted, "that no act of incorporation shall be repealed, unless for some violation of its charter or other default, when such charter shall contain an express provision limiting the duration of the same." So that charters subject to the pleasure of the legislative will were only those of perpetual duration. This proviso was, however, either repealed by express enactment or intentionally left out in subsequent revisions of the statutes, for it is not found in that of 1860, known as the General Statutes of Massachusetts, nor in that of the present year, just published, called the Public Statutes of Massachusetts.

What is the effect of the repeal of the charter of a corporation like this?

One obvious effect of the repeal of a statute is that it no longer exists. Its life is at an end. Whatever force the law may give to transactions into which the corporation entered and which were

authorized by the charter while in force, it can originate no new transactions dependent on the power conferred by the charter. If the corporation be a bank, with power to lend money and to issue circulating notes, it can make no new loan nor issue any new notes designed to circulate as money.

If the essence of the grant of the charter be to operate a railroad, and to use the streets of the city for that purpose, it can no longer so use the streets of the city, and no longer exercise the franchise of running a railroad in the city. In short, whatever power is dependent solely upon the grant of the charter, and which could not be exercised by unincorporated private persons under the general laws of the State, is abrogated by the repeal of the law which granted these special rights.

Personal and real property acquired by the corporation during its lawful existence, rights of contract, or choses in action so acquired, and which do not in their nature depend upon the general powers conferred by the charter, are not destroyed by such a repeal; and the courts may, if the legislature does not provide some special remedy, enforce such rights by the means within their power. The rights of the shareholders of such a corporation to their interest in its property are not annihilated by such a repeal, and there must remain in the courts the power to protect those rights.

And while we are conscious that no definition, at once comprehensive and satisfactory, can be here laid down of what those rights and powers are that remain to the stockholders and the creditors of such a corporation after the act of repeal, we are of opinion that the foregoing observations are sufficient for the case before us.

A short reference to the origin of this reservation of the right to repeal charters of corporations may be of service in enabling us to decide upon its office and effect when called into operation by the legislative exercise of the power.

As early as 1806, in the case of *Wales v. Stetson*, 2 Mass. 143, the Supreme Court of that State made the declaration "that the rights legally vested in all corporations cannot be controlled or destroyed by any subsequent statute, unless a power for that purpose be reserved to the legislature in the act of incorporation." In *Trustees of Dartmouth College v. Woodward*, 4 Wheat. 518, decided in 1819, this court announced principles on the subject of the protection that the charters of private corporations were entitled to claim, under the clause of the Federal Constitution against impairing the obligation of contracts, which, though received at the time with some dissatisfaction, have never been overruled in this court. The opinion in that case carried the protec-

tion of the constitutional provision somewhat in advance of what had been decided in *Fletcher v. Peck*, 6 Cranch, 87, and the preceding cases, and held that it applied not only to contracts between individuals, and to grants of property made by the State to individuals or to corporations, but that the rights and franchises conferred upon private as distinguished from public corporations by the legislative acts under which their existence was authorized, and the right to exercise the functions conferred upon them by the statute, were, when accepted by the corporators, contracts which the State could not impair.

It became obvious at once that many acts of incorporation which had been passed as laws of a public character, partaking in no general sense of a bargain between the States and the corporations which they created, but which yet conferred private rights, were no longer subject to amendment, alteration, or repeal, except by the consent of the corporate body, and that the general control which the legislatures creating such bodies had previously supposed they had the right to exercise no longer existed. It was, no doubt, with a view to suggest a method by which the State legislatures could retain in a large measure this important power, without violating the provision of the Federal Constitution, that Story, J., in his concurring opinion in the *Dartmouth College* case, suggested that when the legislature was enacting a charter for a corporation, a provision in the statute reserving to the legislature the right to amend or repeal it must be held to be a part of the contract itself, and the subsequent exercise of the right would be in accordance with the contract, and could not, therefore, impair its obligation. And he cites with approval the observation we have already quoted from the case of *Wales v. Stetson*, 2 Mass. 143.

It would seem that the States were not slow to avail themselves of this suggestion, for while we have not time to examine their legislation for the result, we have in one of the cases cited to us as to the effect of a repeal (*McLaren v. Pennington*, 1 Paige [N. Y.] 102), in which the legislature of New Jersey, when chartering a bank with a capital of \$400,000 in 1824, declared by its seventeenth section that it should be lawful for the legislature at any time to alter, amend, and repeal the same. And Kent, 2 Com. 307, speaking of what is proper in such a clause, cites as an example a charter by the New York legislature, of the date of February 25, 1822. How long the legislature of Massachusetts continued to rely on a special reservation of this power in each charter as it was granted, it is unnecessary to inquire, for in 1831 it enacted as a law of general application, that all charters of corporations thereafter granted should be subject to amendment, al-

teration, and repeal at the pleasure of the legislature, and such has been the law ever since.

This history of the reservation clause in acts of incorporation supports our proposition, that whatever right, franchise, or power in the corporation depends for its existence upon the granting clauses of the charter, is lost by its repeal.

This view is sustained by the decisions of this court and of other courts on the same question. *Pennsylvania College Cases*, *supra*; *Tomlinson v. Jessup*, 15 Wall. 454; *Railroad Company v. Maine*, 96 U. S. 499; *Sinking Fund Cases*, 99 *id.* 700; *Railroad Company v. Georgia*, 98 *id.* 359; *McLaren v. Pennington*, *supra*; *Erie & N. E. Railroad v. Casey*, *supra*; *Miners' Bank v. United States*, 1 *Greene* (Iowa), 553; 2 *Kent Com.* 306, 307.

It results from this view of the subject that whatever right remained in the Marginal Company to its rolling-stock, its horses, its harness, its stables, the debts due to it, and the funds on hand, if any, it no longer had the right to run its cars through the streets, or any of the streets, of Boston. It no longer had the right to cumber these streets with a railroad track which it could not use, for these belonged by law to no person of right, and were vested in defendants only by virtue of the repealed charter.

It was, therefore, in the power of the Massachusetts legislature to grant to another corporation, as it did, the authority to operate a street railroad through the same streets and over the same ground previously occupied by the Marginal Company. Whether this action was oppressive or unjust in view of the public good, or whether the legislature was governed by sufficient reason in thus repealing the charter of one company and in chartering another at the same time to perform as part of its functions the duties required of the first, is not, as we have seen, a judicial question in this case. It may well be supposed, if answer were required to the complainant's bill, that it was made to appear that the Marginal Company had shown its incapacity to fulfil the objects for which it was created, and that another corporation, embracing larger area, connecting with more freight depots and wharves, and with more capital, could better serve the public in the matter for which both franchises were given.

That in creating the later corporation, whose object was to fulfil a public use, it could authorize it to take such property of other corporations as might be necessary to that use, as well as that of individuals, can hardly admit of question. Sec. 4 of the act gives this power to the Union Company with reference to the tracks of all street railroads in the city, and provides that in the event of an inability to agree with the owners of these tracks as to compensation, that shall be determined in accordance with the

provisions of general laws previously enacted on that subject. To this there can be no valid legal objection. The property of corporations, even including their franchises, when that is necessary, may be taken for public use under the power of eminent domain, on making due compensation. *West River Bridge Co. v. Dix*, 6 How. 507; *Central Bridge Corporation v. City of Lowell*, 4 Gray (Mass.), 474; *Boston Water-power Co. v. Boston & Worcester Railroad Corporation*, 23 Pick (Mass.) 360; *Richmond, etc., Railroad Co. v. Louisa Railroad Co.*, 13 How. 71.

But it is the sixth section of the act which is most bitterly assailed as an invasion of appellant's rights. It declares that the Union Freight Company, within four months from the passage of the act, *shall* take the tracks, or any part thereof, of the Marginal Freight Company, subject to the laws relating to taking land by railroad companies and the compensation therefor. If, as the language seems to imply, the new company is bound to take so much of the track of the old one as it shall need or elect to use, and pay for it within four months, it is a requirement favorable to this company in preference to others, and with especial reference to the fact that its power to use the track for railroad purposes has ceased. If it is merely a permission to take the track on payment of compensation, it is still a favor to the Marginal Company to require this to be done within four months.

A suggestion is made that the Marginal Company acquired by purchase, for \$15,000, the right to the use of the track of the Commercial Freight Company, and that this property stands on different grounds from the remainder of its track.

We are unable to discover any difference in principle. If the new company takes this track, or takes the Marginal Company's right to use it, we suppose the latter will be entitled to compensation for its interest in it, as for other property taken for a public use.

In fact, in regard to the whole question discussed as to the mode of making compensation, and its sufficiency to indemnify the Marginal Company for what is taken, it seems to us to be premature; for whenever the attempt to adjust the compensation is made, the question of its sufficiency and its compliance with the law on that subject may arise, and it can then be decided.

Nor are we satisfied of the soundness of the argument of counsel, that the clause in the Marginal Company's charter which declares it to be subject to the restrictions and liabilities contained in the general laws relating to street railways, withdraws it from the operation of the forty-first section of chapter 68 of the General Laws of the State. The latter clause declares *all* acts of incorporation subject to its provisions. This subjection is not im-

paired by the fact that a particular corporation is made by its charter subject to other laws also of a general character.

We are of opinion that the question of the repeal of the charter of the Marginal Company is to be decided by the construction of the general statute, whose effect and history we have discussed.

These considerations require the affirmance of the decree of the Circuit Court sustaining the demurrer to appellant's bill.

Decree affirmed.

Gray, J., did not sit in this case, nor take any part in deciding it.

CHICAGO LIFE INSURANCE COMPANY v. NEEDLES,
AUDITOR.

IN THE SUPREME COURT OF THE UNITED STATES, MARCH 2, 1885.

[*Reported in 113 United States Reports 574.*]

The facts are stated in the opinion of the court.

C. C. Bonney for plaintiff in error.

J. L. High, E. B. Sherman with him, for defendant in error.

HARLAN, J., delivered the opinion of the court.

By an act of the General Assembly of Illinois, approved February 16, 1865, certain named persons were created a body politic and corporate by the name of the Traveller's Insurance Company, with authority to carry on the business of insuring persons against the accidental loss of life or personal injury sustained while travelling by railways, steamers, and other modes of conveyance. Subsequently, by an act approved February 21, 1867—the provisions of which were formally accepted by the company—its name was changed to that of the Chicago Life Insurance Company, and it was invested with power to make insurance upon the lives of individuals, and of persons connected by marital relations to those applying for insurance, or in whom the applicant had a pecuniary interest as creditor or otherwise; "to secure trusts, grants, annuities, and endowments, and purchase the same, in such manner, and for such premiums and considerations as the board of directors or executive committee shall direct." That, as well as the original act, was declared to be a public act, to be liberally construed for the purposes therein mentioned.

A general law of the State, approved March 26, 1869, and which took effect July 1, 1869, entitled "An Act to organize and regulate the business of life insurance," provides (§ 10): "When the actual funds of any life insurance company doing business in

this State are not of a net value equal to the net value of its policies, according to the 'combined experience' or 'actuaries' rate of mortality, with interest at four per cent. per annum, it shall be the duty of the auditor to give notice to such company and its agents to discontinue issuing new policies within the State until such time as its funds have become equal to its liabilities, valuing its policies as aforesaid. Any officer or agent who, after such notice has been given, issues or delivers a new policy from and on behalf of such company before its funds have become equal to its liabilities as aforesaid, shall forfeit, for each offense, a sum not exceeding one thousand dollars." The same statute requires, among other things, every life insurance company incorporated in Illinois to transmit to the auditor, on or before the first day of March, in each year, a sworn statement of its business, standing, and affairs, in the form prescribed or authorized by law and adapted to its business; empowers that officer to address inquiries to any company in relation to its doings or condition, or to any other matter connected with its transactions, to which it was required to make prompt reply; and makes it his duty to make, or cause to be made, an examination of its condition and affairs, whenever he deems it expedient to do so, or whenever he has good reason to suspect the correctness of any annual statement, or that its affairs are in an unsound condition. The provisions relating to life insurance companies incorporated in other States and doing business in Illinois need not be here examined, or their effect determined.

By another general statute, approved February 17, 1874, in force July 1, 1874, it is provided as follows:

"Sec. 1. If the auditor of State, upon examination of any insurance company incorporated in this State, is of the opinion that it is insolvent, or that its condition is such as to render its further continuance in business hazardous to the insured therein, or to the public, or that it has failed to comply with the rules, restrictions or conditions provided by law, or has exceeded, or is exceeding its corporate powers, he shall apply by petition to a judge of any Circuit Court of this State to issue an injunction, restraining such company, in whole or in part, from further proceeding with its business, until a full hearing can be had, or otherwise, as he may direct. It shall be discretionary with such judge, either to issue said injunction forthwith, or to grant an order for such company, upon such notice as he may prescribe, to show cause why said injunction should not issue, or to cause a hearing to be had on complaint and answer, or otherwise, as in ordinary proceedings in equity, before determining whether an injunction shall be issued. He may in all such cases make such orders and decrees,

from time to time, as the exigencies and equities of the case may require, and in any case, after a full hearing of all parties interested, may dissolve, modify, or perpetuate such injunction, and make all such orders and decrees as may be needful to suspend, restrain, or prohibit the further continuance of the business of the company."

"Sec. 5. When the charter of any such insurance company expires, is forfeited, or annulled, or the corporation is restrained from further prosecution of its business, or is dissolved, as hereinbefore provided, the court, on application of the auditor, or of a member, stockholder, or creditor, may, at any time before the expiration of said two years, appoint one or more persons to be receivers, to take charge of the estate and effects of the company, including such securities as may be deposited with the auditor or treasurer of State, and to collect the debts due, and property belonging to it, with power to prosecute and defend suits in the name of the corporation, or in their own names, to appoint agents under them, and do all other acts necessary for the collection, marshalling, and distributing of the assets of the company, and the closing of its concerns; and, when necessary for the final settlement of its unfinished business, the powers of such receivers may be continued as long as the court deems necessary therefor."

"Sec. 9. The mode of summoning parties into court, the rules of practice, course of procedure, and powers of courts, in cases arising under this act, shall be the same as in ordinary proceedings in equity in this State, except as herein otherwise provided."

Under the authority conferred by the latter statute the auditor caused an examination to be made, by the chief clerk of the insurance department of the State, into the condition of this company. That officer reported that it had been doing a losing business for several years, was insolvent within the meaning of the statute, and that immediate steps should be taken to appoint a receiver, to the end that the affairs of the company be wound up as quickly as possible, as being for the best interests of its policyholders. As the result of that examination, the present proceedings were commenced by the auditor in the Circuit Court of Cook County under the said act of 1874. The petition filed by him shows that, in his opinion, the condition of the company rendered its further continuance in business hazardous to the insured. He prayed that the company be enjoined from further prosecuting its business; that a receiver be appointed to take charge of its real estate and effects; and that such other relief be granted as should be meet. An injunction was issued, and a receiver appointed, with authority to take possession of the property of the company, the latter being directed to execute all conveyances

necessary to vest in him full title to all its property, assets, and choses in action. The company, by its answer, put the plaintiff on proof of all the material allegations of the petition. At the final hearing, it moved the court, upon written grounds, for a final decree in its behalf; one of which was, that the statutes of the State, under which these proceedings were had, were in violation of the Constitution of the United States, in that they impaired the obligation of the contract between the State and the company, as well as of the contracts between the company and its policy-holders and creditors.

This motion was denied, and a final judgment rendered perpetually enjoining the company from further prosecution of its business. From that judgment a writ of error was prosecuted to the Supreme Court of the State, where, among other things, was assigned for error the refusal of the court of original jurisdiction to adjudge that the said statutes of Illinois were in violation of the Constitution of the United States. The judgment of the inferior court was, in all things, affirmed by the Supreme Court of the State, and from that judgment of affirmance the present writ of error is prosecuted.

The Supreme Court of Illinois did not, in terms, pass upon the claim distinctly made there, as in the court of original jurisdiction, that the statutes in question were in derogation of rights and privileges secured to appellant by the Constitution of the United States. But the final judgment necessarily involved an adjudication of that claim; for, if the statutes, upon the authority of which alone the auditor of State proceeded, are repugnant to the National Constitution, that judgment could not properly have been rendered. This court, therefore, has jurisdiction to inquire whether any right or privilege protected by the Constitution of the United States has been withheld or denied by the judgment below. And our jurisdiction is not defeated, because it may appear, upon examination of this federal question, that the statutes of Illinois are not repugnant to the provisions of that instrument. Such an examination itself involves the exercise of jurisdiction. The motion to dismiss the writ of error upon the ground that the record does not raise any question of a federal nature must, therefore, be denied.

The case upon the merits, so far as they involve any question of which this court may take cognizance, is within a very narrow compass. The main proposition of the counsel is that the obligation of the contract which the company had with the State, in its original and amended charter, will be impaired if that company be held subject to the operation of subsequent statutes, regulating the business of life insurance and authorizing the courts, in

certain contingencies, to suspend, restrain, or prohibit insurance companies incorporated in Illinois from further continuance in business.¹ This position cannot be sustained, consistently with the power which the State has, and, upon every ground of public policy, must always have, over corporations of her own creation. Nor is it justified by any reasonable interpretation of the language of the company's charter. // The right of the plaintiff in error to exist as a corporation, and its authority, in that capacity, to conduct the particular business for which it was created, were granted, subject to the condition that the privileges and franchises conferred upon it should not be abused, or so employed as to defeat the ends for which it was established, and that, when so abused or misemployed, they might be withdrawn or reclaimed by the State, in such way and by such modes of procedure as were consistent with law. Although no such condition is expressed in the company's charter, it is necessarily implied in every grant of corporate existence. *Terrett v. Taylor*, 9 Cranch, 43, 51; *Angell & Ames on Corporations*, 9th Edit. § 774, note.

Dec.

Equally implied, in our judgment, is the condition that the corporation shall be subject to such reasonable regulations, in respect to the general conduct of its affairs, as the legislature may, from time to time, prescribe, which do not materially interfere with or obstruct the substantial enjoyment of the privileges the State has granted, and serve only to secure the ends for which the corporation was created. *Sinking Fund Cases*, 99 U. S. 68, 70; *Commonwealth v. Farmers' & Mechanics' Bank*, 21 Pick. 542; *Commercial Bank v. Mississippi*, 4 Sm. & Marsh. 497, 503. If this condition be not necessarily implied, then the creation of corporations, with rights and franchises which do not belong to individual citizens, may become dangerous to the public welfare through the ignorance, or misconduct, or fraud of those to whose management their affairs are intrusted. It would be extraordinary if the legislative department of a government, charged with the duty of enacting such laws as may promote the health, the morals, and the prosperity of the people, might not, when unrestrained by constitutional limitations upon its authority, provide, by reasonable regulations, against the misuse of special corporate privileges which it has granted, and which could not, except by its sanction, express or implied, have been exercised at all.

If the State had no such power, then the statutes under which she proceeds would impair the contract which the company had with her by its charter. But can it be possible that the State, which brought this corporation into existence for the purpose of conducting the business of life insurance, is powerless to protect

¹Only so much of the opinion is given as relates to this question.—Ed.

the people against it, when—assuming, as we must, the facts to be such as the judgment below implies—its further continuance in business would defeat the object of its creation, and be a fraud upon the public, and on its creditors and policy-holders? Did the company, by its charter, have a contract that it should, without reference to the will of the State, or the public interests, exercise the franchises granted by the State after it became insolvent and consequently unable to meet the obligations which, as a corporation, under the sanction of the State, it had assumed to its policy-holders? Our answer to these questions is sufficiently indicated by what has been said. The act of 1869 does not contain any regulation respecting the affairs of any corporation of Illinois which is not reasonable in its character, or which is not promotive of the interests of all concerned in its management. It only guards against mismanagement and misconduct; its requirements constitute reasonable regulations of the business of such local corporations; it does not impair the obligation of any contract which this company had with the State; the conditions imposed upon the rights of the company to continue the issuing of policies are neither arbitrary nor oppressive.

The same general observations apply to the act of 1874, which, recognizing the contract right of the company to carry on business as a corporation, does not, by a legislative decree merely, based upon the *ex parte* representations of public officers, assume to withdraw that right. There is no denial, as counsel supposes, of the equal protection of the laws, nor any deprivation of property without due process of law; for that statute authorizes a public officer to bring the company before a judicial tribunal, which, after full opportunity for defense, may determine whether it is insolvent or its condition such as to render its continuance in business hazardous to the insured or to the public, or whether it has exceeded its corporate powers, or violated the rules, restrictions or conditions prescribed by law; grounds which, if established, constitute sufficient reason why the corporate franchises and privileges granted by the State should be no longer enjoyed. *Terrett v. Taylor*, *ubi supra*; 2 Kent's Com. 304, 312; *Slee v. Bloom*, 5 Johns. Ch. 366, 379; *Commonwealth v. Farmers' & Mechanics' Bank*, 21 Pick. 542. See also Angell & Ames on Corporations, § 774, and note, 9th Ed. That a suit, for such purposes, might be instituted if, in the opinion of the auditor of State, any of those grounds existed, affords no justification to characterize this proceeding as harsh or arbitrary; for, at last, the final judgment of the court must depend upon the facts as established by competent evidence, and not upon the mere opinion of that officer. Indeed, the existence of such an opinion, upon the part of that of-

ficer, as a condition of his right to institute the proceedings prescribed by the act of 1874, is in the interest of the corporations embraced by its provisions; for it furnishes some protection against hasty or oppressive action against them.

These views are strengthened by the company's acceptance of the amended charter granted in 1867. The fifth section of that act is in these words: "This act and the act to which this is an amendment shall not be deemed to exempt said company from the operation of such general laws as may be hereafter enacted by the General Assembly on the subject of life insurance." That section may not be equivalent to a reservation of the right of the legislature to alter, amend, or repeal the original charter at pleasure; and if it be admitted that the company, prior to that amendment, could not have been subjected to the regulations prescribed by the acts of 1869 and 1874, yet it was entirely competent for it to waive—as, by its acceptance of the amended charter, it did waive—any such exemption, and, in consideration of the grant of additional powers, or without any consideration of that character, agree to come under the general laws on the subject of the business in which it was engaged, which did not materially impair its right to carry on that business, or take from it any substantial privilege conferred by the original charter. It took the additional rights given by the act of 1867, subject to the condition imposed by its fifth section.

Judgment affirmed.

MISSOURI PACIFIC RAILWAY CO v. HUMES.

IN THE SUPREME COURT OF THE UNITED STATES, NOVEMBER 23,
1885.

[Reported in 115 United States Reports 512.]

A. B. Browne, A. T. Britton and Thomas J. Portis were with him on the brief, for plaintiff in error.

The court declined to hear argument for defendant in error.

George P. Jackson for the defendant in error, and *T. K. Skinner* filed a brief for same.

FIELD, J., delivered the opinion of the court. After stating the facts in the language reported above, he continued:¹

The ruling below on the objections to the validity of the statute of Missouri, so far as they are founded on its asserted conflict with the Constitution of that State, is not open to review here. As the case comes from a State court, our jurisdiction is limited to

¹The statement of facts has been omitted.—ED.

the objection that the statute violates the first section of the Fourteenth Amendment of the Constitution of the United States, in that it deprives the defendant of property without due process of law, so far as it allows a recovery of damages for stock killed or injured in excess of its value, and also in that it denies to the defendant the equal protection of the laws.

That section, in declaring that no State shall "deprive any person of life, liberty, or property without due process of law," differs from similar clauses in the Constitution of every State, only in that they apply merely to the State authorities. The same meaning, however, must be given to the words "due process of law," found in all of them.

It would be difficult and perhaps impossible to give to those words a definition, at once accurate and broad enough to cover every case. This difficulty, and perhaps impossibility, was referred to by Miller, J., in *Davidson v. New Orleans*, 96 U. S. 97, where the opinion was expressed that it is wiser to ascertain their intent and application by the "gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require, with the reasoning on which such decisions may be founded." P. 104.

In England the requirement of due process of law, in cases where life, liberty, and property were affected, was originally designed to secure the subject against the arbitrary action of the Crown, and to place him under the protection of the law. The words were held to be the equivalent of "law of the land." And a similar purpose must be ascribed to them when applied to a legislative body in this country; that is, that they are intended, in addition to other guaranties of private rights, to give increased security against the arbitrary deprivation of life or liberty, and the arbitrary spoliation of property. But, from the number of instances in which these words are invoked to set aside the legislation of the States, there is abundant evidence, as observed by Miller, J., in the case referred to, "that there exists some strange misconception of the scope of this provision, as found in the Fourteenth Amendment." It seems, as he states, to be looked upon "as a means of bringing to the test of the decision of this court the abstract opinions of every unsuccessful litigant in a State court, of the justice of the decision against him, and of the merits of the legislation on which such a decision may be founded." This language was used in 1877, and now, after the lapse of eight years, it may be repeated with an expression of increased surprise at the continued misconception of the purpose of the provision.

If the laws enacted by a State be within the legitimate sphere

of legislative power, and their enforcement be attended with the observance of those general rules which our system of jurisprudence prescribes for the security of private rights, the harshness, injustice, and oppressive character of such laws will not invalidate them as affecting life, liberty, or property without due process of law. Within the present century the punishment of death or long imprisonment was inflicted in England for many offenses which are not now visited with any severer penalty than a fine or a short confinement, yet no one has ever pretended that life or liberty was taken thereby without due process of law. And it often happens that heavy and oppressive burdens are imposed by statute upon residents of cities and counties, not merely to meet the necessary expenses of government, but for buildings and improvements of doubtful advantage, which sometimes, as in changing the grade of streets, seriously depreciate the value of property. Yet, if no rule of justice is violated in the provisions for the enforcement of such a statute, its operation, in lessening the value of the property affected, does not bring it under the objection of depriving a person of property without due process of law. It is hardly necessary to say that the hardship, impolicy, or injustice of State laws is not necessarily an objection to their constitutional validity; and that the remedy for evils of that character is to be sought from State legislatures. Our jurisdiction cannot be invoked unless some right claimed under the Constitution, laws, or treaties of the United States is invaded. This court is not a harbor where refuge can be found from every act of ill-advised and oppressive State legislation.

It is the duty of every State to provide, in the administration of justice, for the redress of private wrongs; yet the damages which should be awarded to the injured party are not always readily ascertainable. They are in many cases a matter of conjectural estimate, in relation to which there may be great differences of opinion. The general rule undoubtedly is that they should be precisely commensurate with the injury. Yet in England and in this country they have been allowed in excess of compensation, whenever malice, gross neglect, or oppression has caused or accompanied the commission of the injury complained of. "The law," says Sedgwick in his excellent treatise on damages, "permits the jury to give what it terms punitive, vindictive, or exemplary damages; in other words, blends together the interests of society and of the aggrieved individual, and gives damages not only to recompense the sufferer, but to punish the offender." The discretion of the jury in such cases is not controlled by any very definite rules; yet the wisdom of allowing such additional damages to be given is attested by the long continuance of

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the practice. "We are aware," said Grier, J., in *Day v. Woodworth*, 13 How. 362, speaking for this court, "that the propriety of this doctrine has been questioned by some writers; but if repeated judicial decisions for more than a century are to be received as the best exposition of what the law is, the question will not admit of argument. By the common as well as by statute law, men are often punished for aggravated misconduct or lawless acts by means of a civil action, and the damages, inflicted by way of penalty or punishment, given to the party injured." P. 371. See also *Milwaukee & St. Paul Railway Co. v. Arms*, 91 U. S. 489.

du. For injuries resulting from a neglect of duties, in the discharge of which the public is interested, juries are also permitted to assess exemplary damages. These may perhaps be considered as falling under the head of cases of gross negligence, for any neglect of duties imposed for the protection of life or property is culpable, and deserves punishment.

The law of Missouri, in requiring railroad corporations to erect fences where their roads pass through, along, or adjoining enclosed or cultivated fields or unenclosed lands, with openings or gates at farm crossings, and to construct and maintain cattle guards, where fences are required, sufficient to keep horses, cattle, and other animals from going on the roads, imposes a duty in the performance of which the public is largely interested. Authority for exacting it is found in the general police power of the State to provide against accidents to life and property in any business or employment, whether under the charge of private persons or of corporations. Under this power the State, or the municipality exercising a delegated authority, prescribes the manner in which buildings in cities shall be constructed, and the thickness and height of their walls; excludes the use of all inflammable materials, forbids the storage therein of powder, nitro-glycerine, and other explosive substances, and compels the removal of decayed vegetable and animal matter, which would otherwise infect the air and engender disease. In few instances could the power be more wisely or beneficently exercised than in compelling railroad corporations to enclose their roads with fences having gates at crossings, and cattle guards. The speed and momentum of the locomotive render such protection against accident in thickly settled portions of the country absolutely essential. The omission to erect and maintain such fences and cattle guards in the face of the law would justly be deemed gross negligence, and if, in such cases, where injuries to property are committed, something beyond compensatory damages may be awarded to the owner by way of punishment for the company's negligence, the legislature

may fix the amount or prescribe the limit within which the jury may exercise their discretion. The additional damages being by way of punishment, it is clear that the amount may be thus fixed; and it is not a valid objection that the sufferer instead of the State receives them. That is a matter on which the company has nothing to say. And there can be no rational ground for contending that the statute deprives it of property without due process of law. The statute only fixes the amount of the penalty in damages proportionate to the injury inflicted. In actions for the injury the company is afforded every facility for presenting its defense. The power of the State to impose fines and penalties for a violation of its statutory requirements is coeval with government; and the mode in which they shall be enforced, whether at the suit of a private party, or at the suit of the public, and what disposition shall be made of the amounts collected, are merely matters of legislative discretion. The statutes of nearly every State of the Union provide for the increase of damages where the injury complained of results from the neglect of duties imposed for the better security of life and property, and make that increase in many cases double, in some cases treble, and even quadruple the actual damages. And experience favors this legislation as the most efficient mode of preventing, with the least inconvenience, the commission of injuries. The decisions of the highest courts have affirmed the validity of such legislation. The injury actually received is often so small that in many cases no effort would be made by the sufferer to obtain redress, if the private interest were not supported by the imposition of punitive damages.

See 11

The objection that the statute of Missouri violates the clause of the Fourteenth Amendment which prohibits a State to deny to any person within its jurisdiction the equal protection of the laws, is as untenable as that which we have considered. The statute makes no discrimination against any railroad company in its requirements. Each company is subject to the same liability, and from each the same security, by the erection of fences, gates, and cattle guards, is exacted, when its road passes through, along or adjoining enclosed or cultivated fields or unenclosed lands. There is no evasion of the rule of equality where all companies are subjected to the same duties and liabilities under similar circumstances. See on this point *Barbier v. Connolly*, 113 U. S. 27, and *Soon Hing v. Crowley*, 113 U. S. 703.

Judgment affirmed.

NEW ORLEANS GAS CO. v. LOUISIANA LIGHT CO.

IN THE SUPREME COURT OF THE UNITED STATES, DECEMBER 7,
1885.

[Reported in 115 United States Reports 650.]

co organized in 1881
Dues.
THE Louisiana Light and Heat Producing and Manufacturing Co., a corporation of Louisiana, was organized in the year 1881, by H. S. Jackson, W. Van Benthuseu, and their associates, under a general law providing for the formation of corporations for certain purposes, among which are the construction and maintenance of works for supplying cities or towns with gas. These associates and their successors, transferees, and assigns had previously been authorized, by an ordinance of the Common Council of New Orleans passed January 25, 1881, for the period of fifty years, and upon specified conditions, to lay mains, pipes, and conduits in the streets, alleys, sidewalks, bridges, avenues, parks, gardens, and other places in that city, for the purpose of supplying the public with gas. Among the conditions was one to the effect that the rights and privileges defined in the ordinance were granted and accepted without liability upon the part of the city to any other gas company to which franchises had been granted by legislative enactment. The consideration to be paid for these privileges was the sum of \$20,000.

Partly.
The benefit of this municipal grant having been transferred to the Louisiana Light and Heat Producing and Manufacturing Co., and that corporation being about to proceed with the construction of its mains, pipes, and conduits, the present suit was commenced against it and its directors in the Civil District Court of the Parish of New Orleans, by the New Orleans Gas-Light Co., which had been created, as will be presently explained, by the consolidation of other corporations. The plaintiff claimed to be entitled, for the term of fifty years from April 1, 1875, to the sole and exclusive privilege of manufacturing and distributing gas in that city by means of pipes, mains, and conduits laid in its streets, to such persons or corporate bodies as might choose to contract for the same. The relief asked was a decree perpetually enjoining defendant from digging up the streets, and other public ways or places of the city for the purpose of laying pipes, conduits, or mains for supplying illuminating gas, and from asserting any right to do so until after the lapse of fifty years from the latter date.

An application for an injunction having been denied, the suit was thereafter removed by the plaintiff into the Circuit Court of

the United States, upon the ground that it was one arising under the Constitution of the United States. In the latter court a bill was filed, so as to conform to the general rules of equity practice.

A statement of the history of the corporations concerned in the before-mentioned consolidation is necessary to a clear understanding as well of the grounds upon which the court below proceeded, as of the questions argued in this court.

By an act of the legislature of Louisiana, passed April 1, 1835, the New Orleans Gas-Light and Banking Co. was incorporated and was given "the sole and exclusive privilege of vending gas-lights in the city of New Orleans and its faubourgs and the city of Lafayette, to such persons or bodies corporate who may voluntarily choose to contract for the same;" to which end it was authorized to lay pipes or conduits at its own expense in any of the public ways or streets of those localities, having due regard to the public convenience. The right was reserved to the city, after the expiration of forty years, to buy such gas-works as the company constructed, and pay for the same in city bonds. If the city declined to purchase, then its bonds, which the company had received in payment of its subscription of stock, were to be renewed for twenty years.

By amendments of its charter made in 1845 and 1854, the company's right to engage in banking was, by its consent, withdrawn, and the remaining rights granted by the original act were continued to the corporation under the name of the New Orleans Gas-Light Co., to be enjoyed until April 1, 1875, when its corporate privileges were to expire. This change was made subject to the condition that the company should assume all the debts and engagements of the original company, release its claims against the Charity Hospital, and, during the continuance of its charter, furnish that institution with necessary gas and fixtures free of charge. By amendments made in 1860 its charter was extended to April 1, 1895, the exclusive privileges granted by the original charter not, however, to exist beyond the time fixed in the act of incorporation.

By an act approved April 20, 1870, another company, under the name of the Crescent City Gas-Light Co., was incorporated. The charter provided that that company, its successors and assigns, should, for fifty years from the expiration of the charter of the New Orleans Gas-Light Co., have the sole and exclusive privilege of making and supplying gas-lights in the city of New Orleans, by means of pipes or conduits laid in the streets, to such persons or bodies corporate as might voluntarily choose to contract for it. By a subsequent enactment, in 1873, it was given authority to issue bonds to an amount not exceeding \$1,000,000,

*n. G. B. & L.
D. Co.
1835 -*

*n. G. B. & L.
1845 -*

for 1875 -

Exclusive privileges not longer than 1875 -

secured by mortgage of its works and property; and it was declared that the charter of the New Orleans Gas-Light Co. should expire on April 1, 1875, from which latter date, and for the term fixed in the act of 1870, the franchise and privileges granted to the Crescent City Gas-Light Co. were confirmed.

*Crescent city
G. L. Co.
franchise act
1875*

By a judgment rendered February 1, 1875, in a suit brought by the Crescent City Gas-Light Co. against the New Orleans Gas-Light Co., and which involved their respective rights to manufacture and sell gas in New Orleans, the Supreme Court of the State held, that the former company "has the sole and exclusive privilege to make and sell illuminating gas in the city of New Orleans for fifty years from April 1, 1875;" also, that the act of March 1, 1860, extending the charter of the New Orleans Gas-Light Co. from April 1, 1875, until April 1, 1895, "is unconstitutional and void," as having a title that did not declare the object of the act. The latter company was also enjoined from conducting business after April 1, 1875, while the other company was confirmed in its exclusive right, after that date, to manufacture and distribute gas in New Orleans. *Crescent City Gas-Light Co. v. New Orleans Gas-Light Co.*, 27 La. Ann. 138.

*Consolidation
of N. O. & L. C.
✓
C. city & L. Co.*

The bill set out the foregoing facts, and alleged that during February and March, 1875, the directors of the two companies, by means of conferences with each other and with their respective stockholders, concluded to consolidate the two corporations under the name of the New Orleans Gas-Light Co., which should hold and enjoy the rights, privileges, franchises, and property of each; that they determined the amount of its capital, the number of directors, and the persons to compose a board before an election; that the two boards made an agreement, in writing, to which the owners of all the stock of either company had assented; that there had been no contestation by any stockholder of either of the two corporations of the consolidation or consolidation agreement; that "there was a formal vote, comprising more than three-fifths of all owners of stock, ratifying and confirming the articles, and the agreement and certificate of consolidation have been filed and recorded in the office of the Secretary of State;" that "the corporation thus organized and conducting business, from the 29th of March, 1875, has manufactured and sold gas throughout New Orleans without question or opposition," supplying the city, its officers, the officers of the State, and the public generally, and collecting its monthly bills; that there had been no suit by the State or the city questioning its capacity as a corporation, or its title to all the franchises, privileges, rights, or property in its possession; that its possession of "the sole and exclusive right aforesaid has existed from the agreement of the 29th of March,

1875;" that the State regularly assessed the property of the corporation and its franchise for taxation, and compelled it by suit to pay such taxes on property amounting to \$3,750,000, of which the franchise was charged to be worth \$1,250,000; and that the city of New Orleans, in like manner, assessed the consolidated company, and required from it the performance of the obligations of its charter in supplying gas throughout the city and on the public streets and in public buildings ever since the before-mentioned consolidation.

The defendants filed a demurrer and plea to the bill. The case was determined upon the demurrer, which was sustained and the bill dismissed, without any mention being made of the plea.

The Circuit Court was of opinion that the consolidation was entirely without legal authority, and, consequently, that there was, in law, no such corporation as the one which instituted this suit. Upon that ground alone the bill was dismissed.

John A. Campbell and William D. Shipman for appellant.

E. Howard McCaleb for appellee.

HARLAN, J., delivered the opinion of the court. After stating the facts in the language above reported, he continued:

The effect of the consolidation of March 29, 1875, is the first question to be considered.¹

This brings us to the consideration of questions more difficult. It is contended that the right granted to the Crescent City Gas-Light Co., of manufacturing and distributing illuminating gas, and now enjoyed by the consolidated company, was abrogated, to the extent that it was made exclusive, by that article of the Constitution of Louisiana of 1879, which, while preserving rights, claims, and contracts then existing, provided that "the monopoly features in the charter of any corporation now existing in this State, save such as may be contained in the charter of railroad companies, are hereby abolished;" and, that such article is not in violation of the provision of the Constitution of the United States which forbids a State to pass a law impairing the obligation of contracts.

These propositions have received the careful consideration which their importance demands.

It is true, as suggested in argument, that the manufacture and distribution of illuminating gas, by means of pipes or conduits placed, under legislative authority, in the streets of a town or city, is a business of a public character. Under proper management, the business contributes very materially to the public convenience, while, in the absence of efficient supervision, it may disturb the comfort and endanger the health and property of the community.

¹The consideration of this question has been omitted.—Ed.

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It also holds important relations to the public through the facilities furnished, by the lighting of streets with gas, for the detection and prevention of crime. An English historian, contrasting the London of his day with the London of the time when its streets, supplied only with oil lamps, were scenes of nightly robberies, says that "the adventures in gas-lights did more for the prevention of crime than the Government had done since the days of Alfred." Knight, vol. 7, c. 21; Macaulay, c. 3. Municipal corporations constitute a part of the civil government of the State, and their streets are highways, which it is the province of government by appropriate means to render safe. To that end the lighting of streets is a matter of which the public may assume control. For these reasons, and the necessity of uniform regulations for the manufacture and distribution of gas for use by the community, we are of opinion that the supplying of it to the city of New Orleans, and to its inhabitants, by the means designated in the legislation of Louisiana, was an object for which the State could rightfully make provision. Authority for the position that the supplying of gas to a city and its people may become a public purpose is found in *New Orleans v. Clark*, 95 U. S. 644. That case involved the liability of a municipal corporation upon coupon bonds issued to a company which had undertaken, for a valuable consideration, to light its streets with gas. Field, J., delivering the opinion of the court, said: "A private corporation, as well as individuals, may be employed by a city in the construction of works needed for the health, comfort, and convenience of its citizens; and though such works may be used by the corporation for its own gain, yet, as they advance the public good, the corporation may be properly aided in their construction by the city; and for that purpose its obligations may be issued, unless some constitutional or legislative provision stands in the way." P. 652. Legislation of that character is not liable to the objection that it is a mere monopoly, preventing citizens from engaging in an ordinary pursuit or business, open as of common right to all, upon terms of equality; for the right to dig up the streets and other public ways of New Orleans, and place therein pipes and mains for the distribution of gas for public and private use, is a franchise, the privilege of exercising which could only be granted by the State, or by the municipal government of that city acting under legislative authority. *Dillon's Municipal Corp.*, 3d ed., § 691; *State v. Cincinnati Gas Co.*, 18 Ohio St. 262; see also *Boston v. Richardson*, 13 Allen, 146.

To the same effect is the decision of the Supreme Court of Louisiana in *Crescent City Gas-Light Co. v. New Orleans Gas-Light Co.*, 27 La. Ann. 138, 147, in which it was said: "The

right to operate gas-works, and to illuminate a city, is not an ancient or usual occupation of citizens generally. No one has the right to dig up the streets, and lay down gas pipes, erect lamp posts, and carry on the business of lighting the streets and the houses of the city of New Orleans, without special authority from the sovereign. It is a franchise belonging to the State, and, in the exercise of the police power, the State could carry on the business itself or select one or several agents to do so." /

*Police
power*

It will therefore be assumed, in the further consideration of this case, that the charter of the Crescent City Gas-Light Co.—to whose rights and franchises the present plaintiff has succeeded—so far as it created a corporation with authority to manufacture gas and to distribute the same by means of pipes, mains, and conduits, laid in the streets and other public ways of New Orleans, constituted, to use the language of this court in the case of the Delaware Railroad Tax, 18 Wall. 206, "a contract between the State and its corporators, and within the provision of the Constitution prohibiting legislation impairing the obligation of contracts," and therefore "equally protected from legislative interference, whether the public be interested in the exercise of its franchise, or the charter be granted for the sole benefit of its corporators." See also *Greenwood v. Freight Co.*, 105 U. S. 13, 20; *New Jersey v. Yard*, 95 U. S. 104, 113.

But it is earnestly insisted that, as the supplying of New Orleans and its inhabitants with gas has relation to the public comfort, and, in some sense, to the public health and the public safety, and, for that reason, is an object to which the police power extends, it was not competent for one legislature to limit or restrict the power of a subsequent legislature in respect to those subjects. It is, consequently, claimed that the State may at pleasure recall the grant of exclusive privileges to the plaintiff; and that no agreement by her, upon whatever consideration, in reference to a matter connected in any degree with the public comfort, the public health, or the public safety, will constitute a contract the obligation of which is protected against impairment by the National Constitution. And this position is supposed by counsel to be justified by recent adjudications of this court in which the nature and scope of the police power have been considered.

In the *Slaughter House Cases*, 16 Wall. 36, 62, it was said that the police power is, from its nature, incapable of any exact definition or limitation; and, in *Stone v. Mississippi*, 101 U. S. 814, 818, that it is "easier to determine whether a particular case comes within the general scope of the power than to give an abstract definition of the power itself, which will be in all respects accurate." That there is a power, sometimes called the police

power, which has never been surrendered by the States, in virtue of which they may, within certain limits, control everything within their respective territories, and upon the proper exercise of which, under some circumstances, may depend the public health, the public morals, or the public safety, is conceded in all the cases. *Gibbons v. Ogden*, 9 Wheat. 1, 203. In its broadest sense, as sometimes defined, it includes all legislation and almost every function of civil government. *Barbier v. Connolly*, 113 U. S. 27, 31. As thus defined, we may, not improperly, refer to that power the authority of the State to create educational and charitable institutions, and provide for the establishment, maintenance, and control of public highways, turnpike roads, canals, wharves, ferries, and telegraph lines, and the draining of swamps. Definitions of the police power must, however, be taken, subject to the condition that the State cannot, in its exercise, for any purpose whatever, encroach upon the powers of the general Government, or rights granted or secured by the supreme law of the land.

Illustrations of interference with the rightful authority of the general Government by State legislation which was defended upon the ground that it was enacted under the police power, are found in cases where enactments concerning the introduction of foreign paupers, convicts, and diseased persons, were held to be unconstitutional, as conflicting, by their necessary operation and effect, with the paramount authority of Congress to regulate commerce with foreign nations, and among the several States. In *Henderson, etc., v. Mayor of New York*, 92 U. S. 259, the court, speaking by Miller, J., while declining to decide whether in the absence of action by Congress, the States can, or how far they may, by appropriate legislation protect themselves against actual paupers, vagrants, criminals, and diseased persons, arriving from foreign countries, said that no definition of the police power, and "no urgency for its use can authorize a State to exercise it in regard to a subject-matter which has been confided exclusively to the discretion of Congress by the Constitution." P. 271. *Chy Lung v. Freeman*, 92 U. S. 275. And in *Railroad Co. v. Husen*, 95 U. S. 465, Strong, J., delivering the opinion of the court, said that "the police power of a State cannot obstruct foreign commerce or interstate commerce beyond the necessity for its exercise; and, under color of it, objects not within its scope cannot be secured at the expense of the protection afforded by the Federal Constitution." Pp. 473, 474.

That the police power, according to its largest definition, is restricted in its exercise by the National Constitution, is further shown by those cases in which grants of exclusive privileges re-

specting public highways and bridges over navigable streams have been sustained as contracts, the obligations of which are fully protected against impairment by State enactments.

In *Bridge Proprietors v. The Hoboken Co.*, 1 Wall. 116, it was decided that a statute of New Jersey empowering certain commissioners to contract for the building of a bridge over the Hackensack River, and providing not only that the "said contract should be valid on the parties contracting as well as on the State of New Jersey," but that it should not be lawful "for any person or persons whatsoever to erect any other bridge over or across the said river for ninety-nine years," was a contract whose obligation could not be impaired by a law of the State. Miller, J., delivering the opinion of the court, after observing that the parties who built the bridges had the positive enactment of the legislature in the very statute which authorized the contract with them, that no other bridge should be built, and that the prohibition against the erection of other bridges was the necessary and only means of securing to them the benefit of their grant, said: "Without this they would not have invested their money in building the bridges, which were then much needed, and which could not have been built without some such security for a permanent and sufficient return for the capital so expended. On the faith of this enactment they invested the money necessary to erect the bridges. These acts and promises, on the one side and the other, are wanting in no element necessary to constitute a contract." P. 146.

In the *Binghamton Bridge*, 8 Wall. 51, the question was, whether a charter granted to a company, authorizing it to build and maintain a bridge across a river in New York for the accommodation of the public, in consideration for which it was given a right to take certain tolls, and providing that it should be unlawful for any one to erect a bridge, or establish a ferry, within a distance of two miles on that river, either above or below that bridge, constituted a contract within the meaning of the Constitution. Under authority of a subsequent statute, another company erected a bridge across the same river, within a few rods above the old one, to the injury of the business of the latter. The argument was strenuously pressed that, while the legislature could dispose of all matters properly the subject of bargain, it had no authority to dispose of the right of passing a great river for four miles. The court held that the first company's charter was a contract between it and the State, within the protection of the Constitution of the United States, and that the charter to the last company was, therefore, null and void. Davis, J., delivering the opinion of the court, said that if anything was settled by an unbroken chain of decisions in the Federal courts, it was that an act

of incorporation was a contract between the State and the stockholders, "a departure from which *now* would involve dangers to society that cannot be foreseen, would shock the sense of justice of the country, unhinge its business interests, and weaken, if not destroy, that respect which has always been felt for the judicial department of the Government." P. 73. It was also observed, in language applicable to the present case, in some respects: "The purposes to be attained are generally beyond the ability of individual enterprise, and can only be accomplished through the aid of associated wealth. This will not be risked unless privileges are given and securities furnished in an act of incorporation. The wants of the public are often so imperative that a duty is imposed on the Government to provide for them; and, as experience has proved that a State should not directly attempt to do this, it is necessary to confer on others the faculty of doing what the sovereign power is unwilling to undertake. The legislature, therefore, says to public-spirited citizens: 'If you will embark, with your time, money, and skill, in an enterprise which will accommodate the public necessities, we will grant to you, for a limited period, or in perpetuity, privileges that will justify the expenditure of your money, and the employment of your time and skill.' Such a grant is a contract, with mutual considerations, and justice and good policy alike require that the protection of the law should be assured to it." See also *West River Bridge Co. v. Dix*, 6 How. 507, 531.

The same principle was declared by the Supreme Court of Louisiana in *Pontchartrain Railroad Co. v. Orleans Navigation Co.*, 15 La. Ann. 404, 413, where Martin, Ch. J., said: "In the same manner as Congress may reward the discoverer of a new invention or mode of constructing roads, by an exclusive privilege, the legislature may reward those who employ their capital and industry in doubtful enterprises, for the construction of a railway between two points, which may be of great utility to the public, though the success of the enterprise may be precarious." See also *Pontchartrain Railroad Co. v. New Orleans Railway Co.*, 11 La. Ann. 253; *Pontchartrain Railroad Co. v. Lafayette & Pontchartrain Railroad Co.*, *ubi supra*. And in *Crescent City Gas-Light Co. v. New Orleans Gas-Light Co.*, the court said: "As the legislature had the right in 1835 to grant the sole and exclusive privilege to the defendant company to make and vend gas in New Orleans for forty years, the legislature of 1870 had the same power to confer on the plaintiff the same privilege for fifty years from the termination of the grant to defendant. We therefore conclude that the grant of the monopoly complained of does not violate the Constitution and is valid."

Numerous other cases could be cited as establishing the doctrine that the State may by contract restrict the exercise of some of its most important powers. We particularly refer to those in which it is held that an exemption from taxation, for a valuable consideration at the time advanced, or for services to be thereafter performed, constitutes a contract within the meaning of the Constitution. *Asylum v. New Orleans*, 105 U. S. 362, 368; *Home of the Friendless*, 8 Wall. 430; *New Jersey v. Wilson*, 7 Cranch, 164, 166; *State Bank of Ohio v. Knoop*, 16 How. 363, 376; *Gordon v. Appeal Tax Court*, 3 How. 133; *Wilmington Railroad v. Reid*, 13 Wall. 264, 266; *Humphrey v. Pegues*, 16 Wall. 244, 248, 249; *Farrington v. Tennessee*, 95 U. S. 679, 689.

If the State can, by contract, restrict the exercise of her power to construct and maintain highways, bridges, and ferries, by granting to a particular corporation the exclusive right to construct and operate a railroad within certain lines and between given points, or to maintain a bridge or operate a ferry over one of her navigable streams within designated limits; if she may restrict the exercise of the power of taxation, by granting exemption from taxation to particular individuals and corporations; it is difficult to perceive upon what ground we can deny her authority—when not forbidden by her own organic law—in consideration of money to be expended and important services to be rendered for the promotion of the public comfort, the public health, or the public safety, to grant a franchise, to be exercised exclusively by those who thus do for the public what the State might undertake to perform either herself or by subordinate municipal agencies.

The former adjudications of this court, upon which counsel mainly rely, do not declare any different doctrine, or justify the conclusion for which the defendant contends.

In *Beer Co. v. Massachusetts*, 97 U. S. 25, 32, one of the questions considered was, whether the charter of a private corporation, authorizing it to engage in the manufacture of malt liquors, and, as incidental thereto, to dispose of the product, constituted a contract protected against subsequent legislation prohibiting the manufacture of liquors within the State. The *Beer Co.* claimed the right, under its charter, to manufacture and sell beer without limit as to time, and without reference to any exigencies in the health or morals of the community requiring such manufacture to cease. It was decided that, while the company acquired by its charter the capacity, as a corporation, to engage in the manufacture of malt liquors, its business was at all times subject to the same governmental control as like business conducted by individuals; and that the legislature could not divest itself of the

power, by such appropriate means, applicable alike to corporations and individuals, as its discretion might devise, to protect the lives, health, and property of the people, or to preserve good order and the public morals. The prohibitory enactment of which the Beer Co. complained was held to be a mere police regulation which the State could establish even had there been no reservation of authority to amend or repeal its charter.

stop a nuisance | The case of *Fertilizing Co. v. Hyde Park*, 97 U. S. 659, 663, is much relied on by counsel. But a careful examination will show that it does not militate against the views here expressed. A fertilizing company, having been authorized by its charter to establish and maintain south of a specified line in Cook County, Illinois, chemical and other works for manufacturing and converting animal matter into an agricultural fertilizer and other chemical products, claimed that its charter constituted a contract the obligation of which was impaired by an ordinance of the village of Hyde Park, where its works were established, prohibiting under penalties the carrying of offal through its streets from Chicago to the company's place of business. The ordinance was based upon a statute passed after the date of the company's charter, investing the village authorities with power to define or abate nuisances injurious to the public health, and to regulate, prohibit, or license certain named trades or callings, and "all establishments and places where nauseous, offensive, or unwholesome business was carried on." It appeared in proof that the company's factory was "an unendurable nuisance to the inhabitants for many miles around its location; that the stench was intolerable, producing nausea, discomfort, if not sickness to the people; that it depreciated the value of the property, and was a source of immense annoyance;" and that the transportation of putrid animal matter by the company through the streets of Hyde Park "was offensive in a high degree both to sight and smell." The decision was, that the State, under her power to protect the public health, could abate the nuisance created by the company's business notwithstanding its works had been established within the general locality designated in its charter, and, consequently, the legislature could, at its discretion, amend the charter of Hyde Park and remove the restriction upon its authority to abate nuisances, or invest it with power to regulate or prohibit business necessarily injurious to the public health.

The same principles underlie the decision in *Stone v. Mississippi*, 101 U. S. 814, in which it was held that any one accepting a grant of a lottery does so "with the implied understanding that the people, in their sovereign capacity and through their properly constituted agencies, may resume it at any time when the

public good shall require, whether it be paid for or not," the only right acquired by the grantee being "a suspension of certain governmental rights in his favor, subject to withdrawal at will." The business, for the protection of which the contract clause of the Constitution was invoked, was declared by the court to be a species of gambling, wrong in its influence, and tending to "disturb the checks and balances of a well-ordered community." Touching legislation granting the privilege of engaging in business of that character, the chief justice, delivering the opinion of the court, said: "No legislature can bargain away the public health or the public morals. The people themselves cannot do it, much less their servants. The supervision of both these subjects of governmental power is continuing in its nature, and they are to be dealt with as the special exigencies of the moment may require. Government is organized with a view to their preservation, and cannot divest itself of the power to provide for them. For this purpose the largest legislative discretion is allowed, and the discretion cannot be parted with any more than the power itself." P. 819.

We are referred to *Butchers' Union Co. v. Crescent City Co.*, 111 U. S. 746, as authority for the proposition that the State is incapable of making a contract protected by the National Constitution, in reference to any matter within the reach of her police power in its broadest sense. But no such principle is there established. In that case the question was whether a grant in 1869 to a private corporation of the exclusive privilege of maintaining a live-stock landing and slaughter-house, within a certain part of the territory of Louisiana, embracing the city of New Orleans—all slaughtering by others in that city to be done at the establishment erected by that corporation—prevented the State, or the municipal government of the city, acting under her authority, from thereafter opening to general competition the right to maintain slaughter-houses and live-stock landings. The majority of the court, in the *Slaughter-House Cases*, having determined that the grant was merely a police regulation, designed to remove from the thickly populated part of New Orleans "noxious slaughter-houses and large and offensive collections of animals necessarily incident to the slaughtering business of a large city," and that the authority to do that rested upon the same ground as the power to interdict in the midst of dense populations unwholesome trades, operations offensive to the senses, building with combustible materials, and the burial of the dead, it was ruled in the last case that the obligations of a contract could not arise out of such a police regulation. So far from the court saying that the State could not make a valid contract in refer-

ence to any matter whatever within the reach of the police power, according to its largest definition, its language was: "While we are not prepared to say that the legislature can make valid contracts on no subject embraced in the largest definition of the police power, we think that, in regard to two subjects so embraced, it cannot, by contract, limit the exercise of those powers to the prejudice of the general welfare. They are the *public health* and the *public morals*. The preservation of these is so necessary to the best interests of social organization, that a wise policy forbids the legislative body to divest itself of the power to enact laws for the preservation of health and the repression of crime." Pp. 750, 751. In that case, four members of this court, while assenting to the doctrine that the State cannot limit the exercise of her powers to the prejudice of the public health and the public morals, concurred in the judgment upon the general ground, among others, that the act of 1869, giving exclusive privileges to the company, the validity of whose charter, in that respect, was the matter determined in the Slaughter-House Cases, was not, in any just or legal sense, an exercise of the police power for the preservation of the public health, but, under the pretense simply of exerting that power, was an invasion of the right of citizens, other than those interested in that particular company, to engage in an ordinary business, open to every one upon terms of perfect equality, although, at all times, it was subject to such regulations in respect of the locality and the mode in which it should be conducted, as the State might establish.

The principle upon which the decisions in *Beer Co. v. Massachusetts*, *Fertilizing Co. v. Hyde Park*, *Stone v. Mississippi*, and *Butchers' Union Co. v. Crescent City Live-Stock Landing Co.*, rest is, that one legislature cannot so limit the discretion of its successors, that they may not enact such laws as are necessary to protect the public health, or the public morals. That principle, it may be observed, was announced with reference to particular kinds of private business which, in whatever manner conducted, were detrimental to the public health or the public morals. It is fairly the result of those cases, that statutory authority given by the State to corporations or individuals to engage in a particular private business attended by such results, while it protects them for the time against public prosecution, does not constitute a contract preventing the withdrawal of such authority, or the granting of it to others.

The present case involves no such considerations. We have seen the manufacture of gas, and its distribution for public and private use by means of pipes laid, under legislative authority, in the streets and ways of a city, is not an ordinary business in

which every one may engage, but is a franchise belonging to the Government, to be granted, for the accomplishment of public objects, to whomsoever, and upon what terms, it pleases. It is a business of a public nature, and meets a public necessity for which the State may make provision. It is one which, so far from affecting the public injuriously, has become one of the most important agencies of civilization, for the promotion of the public convenience and the public safety. 225

It is to be presumed that the legislature of Louisiana, when granting the exclusive privileges in question, deemed it unwise to burden the public with the cost of erecting and maintaining gas-works sufficient to meet the necessities of the municipal government and the people of New Orleans, and that the public would be best protected, as well as best served, through a single corporation invested with the power, and charged with the duty, of supplying gas of the requisite quality and in such quantity as the public needs demanded. In order to accomplish what, in its judgment, the public welfare required, the legislature deemed it necessary that some inducement be offered to private capitalists to undertake, at their own cost, this work. That inducement was furnished in the grant of an exclusive privilege of manufacturing and distributing gas by means of pipes laid in the streets of New Orleans for a fixed period, during which the company would be protected against competition from corporations or companies engaged in like business. Without that grant it was inevitable either that the cost of supplying the city and its people would have been made, in some form, a charge upon the public, or the public would have been deprived of the security in person, property, and business which comes from well-lighted streets.

It is not our province to declare that the legislature unwisely exercised the discretion with which it was invested. Nor are we prepared to hold that the State was incapable—her authority in the premises not being, at the time, limited by her own organic law—of providing for supplying gas to one of her municipalities and its inhabitants, by means of a valid contract with a private corporation of her own creation. We may repeat here what was said by Taney, Ch. J., in *Ohio Life Insurance & Trust Co. v. Debolt*, 16 How. 415, in reference to the authority of a State to limit the exercise of its power of taxation: "But whether such contracts should be made or not is exclusively for the consideration of the State. It is the exercise of an undoubted power of sovereignty which has not been surrendered by the adoption of the Constitution of the United States, and over which this court has no control. For it can never be maintained in any tribunal in this country that the people of a State, in the exercise of the

powers of sovereignty, can be restrained within narrower limits than that fixed by the Constitution of the United States, upon the ground that they make contracts ruinous or injurious to themselves. The principle that they are the best judges of what is for their own interest is the foundation of our political institutions. It is equally clear, upon the same principle, that the people of a State may, by the form of government they adopt, confer on their public servants and representatives all the power and rights of sovereignty which they themselves possess; or may restrict them within such limits as may be deemed best and safest for the public interest." Pp. 428, 429. After observing that the power of the State to make contracts may be indiscreetly and, for the public, injuriously exercised, he proceeds: "Yet if the contract was within the scope of the authority conferred by the Constitution of the State, it is like any other contract made by competent authority, binding upon the parties. Nor can the people or their representatives, by any act of theirs afterward, impair its obligation. When the contract is made the Constitution of the United States acts upon it and declares that it shall not be impaired, and makes it the duty of this court to carry it into execution. That duty must be performed." P. 429.

With reference to the contract in this case, it may be said that it is not, in any legal sense, to the prejudice of the public health or the public safety. It is none the less a contract because the manufacture and distribution of gas, when not subjected to proper supervision, may possibly work injury to the public; for the grant of exclusive privileges to the plaintiff does not restrict the power of the State, or of the municipal government of New Orleans acting under authority for that purpose, to establish and enforce regulations which are not inconsistent with the essential rights granted by plaintiff's charter, which may be necessary for the protection of the public against injury, whether arising from the want of due care in the conduct of its business, or from an improper use of the streets in laying gas pipes, or from the failure of the grantee to furnish gas of the required quality and amount. The constitutional prohibition upon State laws impairing the obligation of contracts does not restrict the power of the State to protect the public health, the public morals, or the public safety, as the one or the other may be involved in the execution of such contracts. Rights and privileges arising from contracts with a State are subject to regulations for the protection of the public health, the public morals, and the public safety, in the same sense, and to the same extent, as are all contracts and all property, whether owned by natural persons or corporations.

Whatever therefore in the manufacture or distribution of gas in

the city of New Orleans proves to be injurious to the public health, the public comfort, or the public safety, may, notwithstanding the exclusive grant to plaintiff, be prohibited by legislation, or by municipal ordinance passed under legislative authority. It cannot be said with propriety, that to sustain that grant is to obstruct the State in the exercise of her power to provide for the public protection, health, and safety.//The article in the State Constitution of 1879 in relation to monopolies is not in any legal sense an exercise of the police power for the preservation of the public health, or the promotion of the public safety; for the exclusiveness of a grant has no relation whatever to the public health, or to the public safety. These considerations depend upon the nature of the business or duty to which the grant relates, and not at all upon the inquiry whether a franchise is exercised by one rather than by many. The monopoly clause only evinces a purpose to reverse the policy, previously pursued, of granting to private corporations franchises accompanied by exclusive privileges, as a means of accomplishing public objects. That change of policy, although manifested by constitutional enactment, cannot affect contracts which, when entered into, were within the power of the State to make, and which, consequently, were protected against impairment, in respect of their obligation, by the Constitution of the United States.//A State can no more impair the obligation of a contract by her organic law than by legislative enactment; for her Constitution is a law within the meaning of the contract clause of the National Constitution. *Railroad Co. v. McClure*, 10 Wall. 511; *Ohio Life Ins. & T. Co. v. Debolt*, 16 How. 416, 429; *Sedgwick's Stat. & Const. Law*, 637. And the obligation of her contracts is as fully protected by that instrument against impairment by legislation as are contracts between individuals exclusively. *New Jersey v. Wilson*, 7 Cranch, 164; *Providence Bank v. Billings*, 4 Pet. 514; *Green v. Biddle*, 8 Wheat. 1; *Woodruff v. Trapnall*, 10 How. 190; *Wolff v. New Orleans*, 103 U. S. 358.

If, in the judgment of the State, the public interests will be best subserved by an abandonment of the policy of granting exclusive privileges to corporations, other than railroad companies, in consideration of services to be performed by them for the public, the way is open for the accomplishment of that result, with respect to corporations whose contracts with the State are unaffected by that change in her organic law. The rights and franchises which have become vested upon the faith of such contracts can be taken by the public, upon just compensation to the company, under the State's power of eminent domain. *West River Bridge Co. v. Dix*, *ubi supra*; *Richmond, etc., Railroad Co. v. Louisa Railroad Co.*, 13 How. 71, 83; *Boston Water-Power Co. v.*

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Boston & Worcester Railroad, 23 Pick. 360, 393; Boston & Lowell Railroad Co. *v.* Salem & Lowell Railroad Co., 2 Gray, 1, 35. In that way the plighted faith of the public will be kept with those who have made large investments upon the assurance by the State that the contract with them will be performed.

The demurrer to the bill of complaint should have been overruled. Upon its averments the complainant was entitled to a decree perpetually restraining the defendants, and each of them, their servants, agents, and employees, from the manufacture and distribution of gas in New Orleans, by means of pipes, mains, and conduits laid in or along the streets and other public ways and places of that city.

The decree dismissing the bill is reversed, and the cause remanded for further proceedings in conformity with this opinion.

THE PEOPLE OF THE STATE OF NEW YORK, APPELLANT AND RESPONDENT, *v.* JOHN O'BRIEN, AS RECEIVER, ETC., *et al.*, APPELLANTS AND RESPONDENTS.

IN THE COURT OF APPEALS OF NEW YORK, NOVEMBER 27, 1888.

[Reported in 111 *New York Reports* 1.]

THESE are cross appeals from a judgment of the General Term of the Supreme Court in the Third Judicial Department, entered upon an order made at the October Term, 1887, which affirmed a judgment entered upon a decision of the court on trial at General Term.

This action was brought by the Attorney-General, in the name of the People, against John O'Brien, as Receiver of the Broadway Surface Railroad Co.; the Mayor, etc., of the city of New York; the Broadway and Seventh Avenue Railroad Co.; the Twenty-third Street Railway Co.; William H. Hayes, Francis A. Palmer, as trustees under certain mortgages executed by said Broadway Surface Railroad Company, also the president and trustees of said company at the time of its dissolution, and various other persons.

The nature of the action and the material facts are stated in the opinion.

Charles F. Tabor, Attorney-General, and *William A. Poste* for the people.

Denis O'Brien for the receiver.

James C. Carter and *Elihu Root* for the Broadway and Seventh Avenue Railroad Co., defendant.

Albert Stickney and *Nelson S. Spencer* for the Twenty-third Street Railway Co. and *Jacob Sharp*, defendants.

S. P. Nash for bondholders, respondents, and *Lyman Rhoades* for mortgagee in trust, respondent.

Edward Winslow Paige for Mr. Palmer, trustee, etc., respondent.

Thomas Allison for the Mayor, etc., respondent.

William C. Gulliver for James A. Richmond and others, respondents.

RUGER, Ch. J.¹ . . . After its incorporation the Broadway Surface Co. mortgaged its property and franchises as security for contemplated loans, and authorized its bonds to be put upon the market for sale to the public generally, and they were largely purchased by investors, without notice of any defect in their origin or execution. It also made contracts with other street railroad companies owning, respectively, lines of road connecting with the contemplated line of the Broadway Surface Co. and diverging therefrom to distant parts of the city, for the use of their several tracks by each other, for which it received a large present pecuniary consideration from each of said companies besides the exchange of mutual benefits and accommodations.

It is not disputed but that upon the entry of the order of confirmation, the Broadway Surface Railroad Co. became vested with the right of constructing a railroad on Broadway and running cars thereon, to as full an extent as it had power to acquire, or the State and city authorities had authority to grant.

In the spring of 1885 the company caused its track to be constructed over the route authorized, and from that time to the 4th day of May, 1886, when it was dissolved by an act of the legislature, in connection with other railroad companies, ran its cars over such road and the connecting lines.

On May 14, 1886, in an action between the People, as plaintiff, and James A. Richmond, the former president of the Broadway Surface Railroad Co., as sole defendant, upon the application of the Attorney-General, one John O'Brien was appointed receiver of the property formerly belonging to the Broadway Surface Co., by a justice of the Supreme Court of the Third Judicial District, in an *ex parte* order based upon the summons and complaint in that action, in pursuance of and under the authority alone of the provisions of c. 310 of the Laws of 1886.

The present action was a supplementary action brought July 8, 1886, by the Attorney-General in the name of the People of the

¹Portions of the opinion have been omitted.—Ed.

State against the City of New York, the receiver of the Broadway Surface Railroad Co., and numerous other corporations and persons alleged to have had dealings with such company, either as stockholders, mortgagees, creditors or contractors, for the purpose of obtaining a judgment declaratory of the rights and liabilities of the several parties, as affected by the dissolution of the corporation, determining the fact as to what were assets of the company, and the extent of the interests of the several parties therein, and restraining the mortgagees, contractors and others from taking legal proceedings to enforce their rights in and liens upon the property of the corporation. . . .

It is not easy to see on what theory such an action can be maintained. The State has no interest entitling it to intervene to prevent a multiplicity of actions between other parties. Neither does the action seem necessary or proper in aid of the former action. . . .

Considering, therefore, the magnitude of the interests affected and the importance to the public generally of a speedy determination of the questions, involving the right of operating a street railroad on Broadway, notwithstanding the dissolution of the corporation to which that right was originally granted, we refrain from disposing of the case upon the ground referred to, and proceed to an examination of the questions upon which such right depends.

Their determination involves an inquiry into the rights secured by the mortgagees and bondholders through the mortgages upon the property and franchises of the railroad company; the validity of the traffic contracts made by it with other street railroad corporations, and the effect which the legislation of 1886, comprised in cc. 268, 271, and 310, had upon such questions. In other words, we think the material question for discussion here is whether the franchise to maintain tracks and run cars on Broadway survived the dissolution of the corporation, and if so, upon whom the right of administering its affairs devolved.

Upon the trial of the action a judgment was rendered in favor of the defendants, except the receiver, to the effect that the mortgages were valid liens upon the property and franchises of the company and survived the dissolution of the corporation; that the traffic contracts were made by authority of law and could be enforced notwithstanding the dissolution of the corporation; and that c. 271 and parts of c. 310 of the Laws of 1886 were unconstitutional, as violative of the restrictions of the fundamental law in relation to legislation impairing the obligation of contracts, and constituting a taking of "property without due process of law."

The court also held that this action was maintainable in the

name of the People; that a receiver of the property of the dissolved corporation had been lawfully appointed; that he was entitled to take possession of its property and wind up its affairs, and that the plaintiffs were entitled to a perpetual injunction restraining all of the defendants, except the receiver, from proceeding with actions already begun, or from instituting other proceedings or actions to enforce, maintain, or assert any of the claims, demands, or rights of action affecting in any manner the affairs, property, rights, and privileges of the Broadway Surface Railroad Co. which have been tried and determined in this action. Not only the plaintiff, but each of the defendants, except the Broadway and Seventh Avenue Railroad Co., appealed from this judgment to the General Term. That court affirmed the judgment of the trial court.

The plaintiff and all of the defendants, except the two railroad corporations, appeal from the judgment of affirmance to this court, and thus bring before us every determination involved in the judgment.

A review of the judgment brings up for consideration propositions very grave in character, not only on account of the extent of the private interests affected, but because their determination will affect great public questions arising out of the limitations imposed by the Constitution upon the legislative power over the property of corporations lawfully acquired.

The statutes upon which the action is predicated confessedly assume the right and power of the legislature to wrest from the company its franchises; to transfer them to other persons, and bestow their value upon the donees of the State. The statutes contemplate the absolute destruction of the property of the corporation, and the loss of its value to the creditors who have made loans in good faith upon the security of such property, and this action is avowedly prosecuted to accomplish the purposes of the legislation. It is, therefore, urgently contended by the Attorney-General that none of the franchises of the corporation survived its dissolution, and that the mortgages previously given thereon, as well as all contracts made with connecting street railroads for the mutual use of their respective roads, fell with the repeal and could not be enforced.

If it could be supposed for a moment that this claim was reasonably supported by authority, or maintainable in logic or reason, it would give grave cause for alarm to all holders of corporate securities.

The contention that securities representing a large part of the world's wealth are beyond the reach of the protection which the Constitution gives to property, and are subject to the arbitrary

will of successive legislatures, to sanction or destroy at their pleasure or discretion, is a proposition so repugnant to reason and justice as well as the traditions of the Anglo-Saxon race in respect to the security of rights of property, that there is little reason to suppose that it will ever receive the sanction of the judiciary, and we desire in unqualified terms to express our disapprobation of such a doctrine. Whatever might have been the intention of the legislature or even of the framers of our Constitution in respect to the effect of the power of repeal reserved in acts of incorporation, upon the property rights of a corporation, such power must still be exercised in subjection to the provisions of the Federal Constitution.

Considering the power which the State has to terminate the life of corporations organized under its laws, and the authority which its Attorney-General has by suit to forfeit its franchises for misuse or abuse and to regulate and restrain corporations in the exercise of their corporate powers, there is little danger to be apprehended in the future from the overgrowth of power, or the monopolistic tendencies of such organizations; but whatever that danger may be, it is trivial in comparison with the widespread loss and destruction which would follow a judicial determination, that the property invested in corporate securities was beyond the pale of the protection afforded by the fundamental law.

It is not perhaps strange, in the great variety of cases bearing upon the subject, and the manifold aspects in which questions relating to corporate rights and property have been presented to the courts, that dicta, couched in general language, may be found giving color to the plaintiff's claim; but we think that there are no reported cases in which the judgment of the court has ever taken the franchises or property of a corporation from its stockholders and creditors, through the exercise of the reserved power of amendment and repeal, or transferred it to other persons or corporations, without provision made for compensation.

Among other claims made by the State, it is contended that the stated term of one thousand years prescribed in its charter, for the duration of the company, constitutes a limitation upon the estate granted, and that, therefore, the corporation took a qualified estate only in its franchises, and that the rights reserved by the Revised Statutes (Laws of 1884 and 1850) and the Constitution to alter, amend, and repeal the charters or laws under which corporations might be organized, also constituted a limitation upon the estate granted, and that the exercise of the right of repeal by the State accomplished the destruction of the corporation and the annihilation of all franchises acquired under its charter.

It will be convenient in the first instance to consider the nature

of the right acquired by the corporation under the grant of the Common Council, with respect to its terms or duration. . . .

We are, therefore, of the opinion that the Broadway Surface Railroad Co. took an estate in perpetuity in Broadway through its grant from the city, under the authority of the Constitution and the act of the legislature. It is also well settled by authority in this State that such a right constitutes property within the usual and common signification of that word. *Sixth Ave. R. R. Co. v. Kerr*, 72 N. Y. 330; *People v. Sturtevant*, 9 *id.* 263.

When we consider the generality with which investments have been made in securities based upon corporate franchises throughout the whole country; the numerous laws adopted in the several States providing for their security and enjoyment, and the extent of litigation conducted in the various courts, State and Federal, in which they have been upheld and enforced, there is no question but that in the view of legislatures, courts, and the public at large, certain corporate franchises have been uniformly regarded as indestructible by legislative authority, and as constituting property in the highest sense of the term.

It is, however, earnestly contended for the State that such a franchise is a mere license or privilege enjoyable during the life of the grantee only, and revocable at the will of the State. We believe this proposition to be not only repugnant to justice and reason, but contrary to the uniform course of authority in this country. The laws of this State have made such interests taxable, inheritable, alienable, subject to levy and sale under execution, to condemnation under the exercise of the right of eminent domain, and invested them with the attributes of property generally.

We will refer to a few only of the statutes on this subject from which the implication arises not only that the State intended to invest these franchises with the character of property, but also to enable their mortgagees, purchasers, and assigns to enjoy their use under an indefeasible title. Thus railroad corporations have been authorized to contract with other corporations for a qualified transfer of such franchises for terms unlimited except by the agreement of the parties (c. 218, Laws of 1839; § 2, c. 1843, Laws of 1872; § 15, c. 252, Laws of 1884); to pledge them by way of mortgage as security for loans (sub. 10, § 28, Laws of 1850); to consolidate with other companies owning connecting and continuous lines of railroad, and continue the use of such franchises under the name of their successors. C. 108, Laws of 1875; *Shields v. Ohio*, 95 U. S. 319. Mortgagees and others have been authorized to purchase such franchises upon mortgage sale and otherwise, and afforded the right to organize so as to enjoy their use thereafter. § 1, c. 444, Laws of 1857; c. 469 and 710, Laws

of 1873; c. 113, Laws of 1880; c. 430, Laws of 1874. Purchasers upon a mortgage or execution sale have been authorized to form associations for the purpose of continuing the operation of such railroad with all its powers, privileges, and franchises. § 1, c. 469 and 710, Laws of 1873; § 1, c. 282, Laws of 1854. The sale of such franchises has been authorized by the municipality where located to parties proposing to build street railroads. Constitutional Amendment of 1875, § 7, c. 252, Laws of 1884; c. 62 and 66, Laws of 1886. And by § 15 of the act under which this corporation was organized, such companies were expressly permitted to lease or transfer their rights and franchises to other street railroad corporations. Indeed, it is matter of public history that one-half of the railroads of the State are now operated by organizations other than those to whom the franchises were originally granted, notwithstanding their dissolution, through transfers effected by the foreclosure of mortgages and otherwise.

The statutes cited, as well as others not specially referred to, indicate the general policy of the State to render such interests independent of the life of the original corporation and transferable as property by means of judicial proceedings and otherwise, under certain restrictions not pertinent to our present purpose particularly to consider. *People v. Brooklyn F. & C. I. R. R. Co.*, 89 N. Y. 84. . . .

These rights of property having been acquired and created under the express sanction and authority of the State, it remains to inquire whether they were defeasible and subject to be taken away through the exercise of any power reserved by the State to alter, amend, and repeal laws or charters.

The reservations applying to this case are claimed to be as follows: 1. § 1, art. 8, title "Corporations, how created" (Constitution of 1846), providing that "all general laws and special acts passed pursuant to this section may be altered from time to time or repealed." 2. § 8, title 3, c. 18 of the Revised Statutes (7th ed.), providing that "the charter of every corporation that shall be granted by the legislature shall be subject to alteration, suspension, and repeal in the discretion of the legislature." 3. § 48, c. 140, Laws of 1850, providing that "the legislature may at any time annul or dissolve any incorporation formed under this act, *but such dissolution shall not take away or impair any remedy given against any such corporation, its stockholders, or officers for any liability which shall have been previously incurred.*" And 4. C. 282, Laws of 1884, under which this corporation was organized, giving it all the powers and privileges granted, and subject to all the liabilities imposed by c. 140, Laws of 1850,

and the several acts amendatory thereof, and further providing that "the legislature may at any time alter, amend, or repeal this act." § 19.

The Constitution of 1846 for the first time introduced restrictions upon the power of legislatures to grant special charters, and required that provisions for corporations, save in exceptional cases, should thereafter be made by general laws. The obvious intent of the constitutional reservation was to remove any doubt as to the power of the legislature to amend or repeal the laws, whether general or special, authorized by that instrument for the formation of corporations, and seemed to leave the provisions of the Revised Statutes, in relation to reserved power over charters, in full force and effect.

It will be observed that the Constitution and the act of 1884 provide specially for the amendment and repeal of statutes alone, but the Revised Statutes and the act of 1850 are addressed specially to the subject of the annulment and repeal of charters created under such statutes.

It seems to us that these provisions relate to different subjects—namely, the repeal of laws, and the annulment of charters formed under such laws, and that the power to do one does not naturally or properly include the power to do the other. *Albany Northern R. R. Co. v. Brownell*, 24 N. Y. 345.

Certainly the repeal of a law authorizing corporations would not destroy organizations formed under it, nor would the annulment of a charter affect the law under which it was created. Neither does it seem reasonable to suppose, while taking away the power of the legislature to create corporate bodies, the Constitution intended to confer power to destroy them, thus enabling them to accomplish indirectly that which they were precluded from doing directly. It must be assumed that the framers of the Constitution, as well as the legislature, used the language employed by them intelligently and according to its common and customary signification, and when they spoke of the annulment and repeal of acts and laws alone, did not intend to embrace charters as well. These two subjects have frequently been the occasion of legislative action, and since the restrictions upon the powers of the legislature to grant special charters, there is no reason to suppose that they did not use the language employed in its literal sense, and especially so when both subjects were immediately within the contemplation of the lawmakers.

In considering this question the provisions of the Revised Statutes may be laid out of view, for if they contain any broader power than the act of 1850, they must be deemed to have been repealed by the provisions of the latter act, as inconsistent there-

with. The reservations, therefore, which apply to this case are contained in the acts of 1850 and 1884, which constitute a part of the railroad charter.

These acts should be read and construed together, and, as thus considered, provide that the legislature may at any time alter, amend, and repeal these acts, and may also annul and dissolve charters formed thereunder, but such dissolution shall not take away or impair any remedy against such corporation, its officers and trustees, for any liability previously incurred. The contract proved between the corporation and the State was intended, in respect to a repeal of the charter, to survive the dissolution of the corporation, and to determine the rights of parties interested in the property, in the event of dissolution. By virtue of this contract the corporation secured rights subject to be taken away under certain restrictions, and protected itself from any consequences following a repeal of its charter, except those expressly agreed upon.

But even if it be conceded that the constitutional provisions place the right to repeal charters, as well as laws, beyond the power of legislatures to waive or destroy, the question still remains as to the effect of such a repeal upon the franchises of the corporation; whether it contemplates anything more than the extinction of the corporate life, and consequent disability to continue business and exercise corporate functions after that time, or has a wider scope and effect.

It may be assumed in this discussion that the authority of the legislature to repeal a charter, if it has expressed its intention to reserve such power in its grant, constitutes a valid reservation. Parties to a contract may lawfully provide for its termination at the election of either party, and it may, therefore, be conceded that the State had authority to repeal this charter, provided no rights of property were thereby invaded or destroyed. In speaking of the franchises of a corporation we shall assume that none are assignable except by the special authority of the legislature. We must also be understood as referring only to such franchises as are usually authorized to be transferred by statute—namely, those requiring for their enjoyment the use of corporeal property, such as railroad, canal, telegraph, gas, water, bridge, and similar companies, and not to those which are in their nature purely incorporeal and inalienable, such as the right of corporate life, the exercise of banking, trading, and insurance powers, and similar privileges. The franchises last referred to being personal in character and dependent upon the continued existence of the donee for their lawful exercise, necessarily expire with the extinction of corporate life, unless special provision is otherwise made.

People v. B., F. & C. I. R. R. Co., 89 N. Y. 84; *People v. Metz*, 50 *id.* 61.

In the former class it has been held that at common law real estate acquired for the use of a canal company could not be sold on execution against the corporation separate from its franchise, so as to destroy or impair the value of such franchise. *Gue v. Tide Water Canal Co.*, 24 How. (U. S.) 257. And by parity of reasoning it must follow that the tracks of a railroad company, and the franchise of maintaining and operating its road in a public street, are equally inseparable, in the absence of express legislative authority providing for their severance.

The statute of our State authorizing the sale of the franchise and property of a railroad company on execution, seems to recognize the indissolubility of the connection between the corporeal property and its incorporeal right of enjoyment.

It is also to be observed that in none of the provisions for repeal in this State is there anything contained which purports to confer power to take away or destroy property or annul contracts, and the contention that the property of a dissolved corporation is forfeited rests wholly upon what is claimed to be the necessary consequence of the extinction of corporate life. We do not think the dissolution of a corporation works any such effect. It would not naturally seem to have any other operation upon its contracts or property rights than the death of a natural person upon his. *Mumma v. Potomac Co.*, 8 Pet. 281, 285.

The power to repeal the charter of a corporation cannot, upon any legal principle, include the power to repeal what is in its nature irrevocable, or to undo what has been lawfully done under power lawfully conferred. *Butler v. Palmer*, 1 Hill, 335.

The authorities seem to be uniform to the effect that a reservation of the right to repeal enables a legislature to effect a destruction of the corporate life, and disable it from continuing its corporate business (*People ex rel. Kimball v. B. & A. A. R. R. Co.*, 70 N. Y. 569; *Philips v. Kickham*, 1 Paige, 590), and a reservation of the right to alter and amend confers power to pass all needful laws for the regulation and control of the domestic affairs of a corporation, freed from the restrictions imposed by the Federal Constitution upon legislation impairing the obligation of contracts. *Munn v. Illinois*, 94 U. S. 113, 123.

We think no well-considered case has gone further than this, while in many cases such power has been expressly held to be limited to the effect stated. In the language of Marshall, Ch. J., in *Fletcher v. Peck*, 6 Cranch, 87, 135: "If an act be done under a law, a succeeding legislature cannot undo it. The past cannot be recalled by the most absolute power. Conveyances have been

made; those conveyances have vested legal estates, and if those estates may be seized by the sovereign authority, still that they originally vested is a fact, and cannot cease to be a fact. When, then, a law is in the nature of a contract, when absolute rights have vested under that contract, a repeal of the law cannot divest those rights."

It would seem to be quite obvious that a power existing in the legislature by virtue of a reservation only could not be made the foundation of an authority to do that which is expressly inhibited by the Constitution, or afford the basis of a claim to increase jurisdiction over the lives, liberty, or property of citizens beyond the scope of express constitutional power.

Since the decision of the celebrated Trustees Dartmouth College *v.* Woodward, 4 Wheat. 518, the doctrine that a grant of corporate powers by the sovereign, to an association of individuals, for public use, constitutes a contract within the meaning of the Federal Constitution, prohibiting State legislatures from passing laws impairing its obligations, has, although sometimes criticised, been uniformly acquiesced in by the courts of the several States as the law of the land, and may be regarded as too firmly established to admit of question or dispute. *People v. Sturtevant, supra*; *Milhau v. Sharp, supra*; *Brooklyn Cent. R. R. Co. v. Brooklyn City R. R. Co., supra*. The intimation, by Story, J., in that case, that the rule might be otherwise if the legislature should reserve the power of amending or repealing it, led to the adoption, by the legislatures of the various States, of the practice of incorporating such reservations in acts of incorporation. Whatever may be the effect of such reservations, it is immaterial whether they are embraced in the act of incorporation or in general statutes or provisions of the Constitution. In either case they operate upon the contract according to the language of the reservation. Morawetz on Corp. 464. It is manifest, therefore, that in the absence of such reserved power, legislatures have no authority to violate, destroy, or impair chartered rights and privileges, or power over corporations, except such as they possess by virtue of their legislative authority over persons and property generally. It is obvious that this reserved power does not, in any sense, constitute a condition of the grant, and cannot have effect as such, but is simply a power to put an end to the contract, with such effect upon the rights of the parties thereto as the law ascribes to it. *Sinking Fund Cases*, 99 U. S. 700, 748; *Tomlinson v. Jessup*, 15 Wall. 454, 457. In speaking of the exercise of this power by Congress in the *Sinking Fund Cases*, Waite, Ch. J., says: "Congress not only retains but has given special notice of its intention to retain full and complete power to make such alterations and amend-

ments of the charter as come within the just scope of the legislative power. That this power has a limit no one can doubt. All agree that it cannot be used to take away property already acquired under the operation of the charter, or to deprive the corporation of the fruits actually reduced to possession of contracts lawfully made. . . . Whatever rules Congress might have prescribed in the original charter for the government of the corporation in the administration of its affairs, it retained the power to establish by amendment. In doing so it cannot undo what has already been done, and it cannot unmake contracts that have already been made, but it may provide for what shall be done in the future and may direct what preparation shall be made for the due performance of contracts already entered into. It might originally have prohibited the borrowing of money on mortgage, or it might have said that no bonded debt should be created without ample provision by sinking fund to meet it at maturity. Not having done so at first, it cannot now, by direct legislation, vacate mortgages already made under the powers originally granted, nor release debts already contracted."

The judges dissenting in that case contended that the reserved power could not be construed as authorizing the alteration, violation, or nullification of any of the material provisions of the grant, but should be held to mean simply a reservation of the power to legislate, freed from the restrictions imposed by the constitutional provisions against legislation impairing the obligations of contracts. Bradley, J., said: "The reserved power in question is simply that of legislation, to alter, amend, or repeal a charter. This is very different from the power to violate or to alter the terms of a contract at will. A reservation of power to violate a contract, or alter it, or impair its obligation, would be repugnant to the contract itself and void. A proviso repugnant to the granting part of a deed, or to the enacting part of a statute, is void. Interpreted as a reservation of the right to legislate, the reserved power is sustainable on sound principles; but interpreted as the reservation of the right to violate an executed contract it is not sustainable."

This dissent proceeded upon the ground that the acts of Congress under consideration changed some of the essential features of the contract, and were, therefore, void, as being obnoxious to the provisions of the Constitution for the protection of life, liberty, and property. The majority of the court held, however, that such acts were simply an exercise of the power of Congress to regulate the internal administration of the affairs of a corporation, which, to a certain extent, it was unanimously agreed that it possessed. There was no dispute or disagreement as to the cor-

rectness of the rule stated, that the power of amendment and repeal was a restricted power, limited by the provisions of the Constitution. An interpretation conferring the power of violating a contract at will upon one of its parties, under a clause authorizing its amendment or repeal, would seem to be inconsistent with any reasonable notion of the nature of such an instrument, and beyond the power of parties lawfully to create.

If it is possible to conceive the idea of a repealable grant, certainly such a grant, accompanied with power to convey or pledge the interest granted, must, on the execution of the power, necessarily preclude a resumption by the grantor of the subject of the grant, or any right of property acquired under it. An express reservation by the legislature of power to take away or destroy property lawfully acquired or created would necessarily violate the fundamental law, and it is equally clear that any legislation which authorizes such a result to be accomplished indirectly would be equally ineffectual and void. . . .

And, finally, upon this branch of our subject, we are unable to see why § 48 of the Law of 1850 does not express the rule by which the question under discussion must be determined. That section is expressly made a part of the contract between the State and corporations organized thereunder, and specially provides for the effect which an exercise of the reserved power of repeal by the State shall have upon the franchises of the company. It shall not impair any remedy existing against the corporation, its directors, or officers upon a liability previously incurred. This was the contract under which the dissolved corporation issued its stock, mortgaged its franchises, entered into traffic engagements and contracted debts. Creditors, contractors, and stockholders had a right to rely upon the promise of the State, that the annulment of the corporate charter should not affect the remedies existing in their favor against the corporation, and this promise is a contract protected by the provisions of the Federal Constitution.

In the absence of any constitutional provision prescribing the effect of such repeal, it was competent for the legislature to declare what that should be, and for the State to contract with reference to such a declaration. The right of repeal, as provided by the Constitution, is fully recognized by the act of 1850, and the effect of the exercise of the power upon the rights of parties affected thereby is clearly defined.

We are, therefore, of opinion that the statute not only prescribes the rule, creates the contract, and regulates the rights of the parties upon the exercise by the State of the power of repeal, but it also correctly formulates the principle of law applicable to the situation. . . .

We are, therefore, of the opinion that the Broadway Surface Co. took an indefeasible title to the land necessary to enable it to construct and maintain a street railroad in Broadway, and to run cars thereon for the transportation of freight and passengers, which survived its dissolution.

We are thus brought to the question of the right of succession to the property of a dissolved corporation in the absence of any provision in the act of dissolution providing for such an event.

Secs. 9 and 10, tit. 3, c. 18, part 1, Revised Statutes (pp. 132, 153 [7th ed.]), seem to furnish a conclusive solution to the inquiry. They read as follows: "Sec. 9. Upon the dissolution of any corporation created or to be created, and unless other persons shall be appointed by the legislature, or by some court of competent authority, the directors or managers of the affairs of such corporation *at the time of its dissolution*, by whatever name they may be known in law, shall be the trustees of the creditors and stockholders of the corporation dissolved, and shall have full power to settle the affairs of the corporation, collect and pay the outstanding debts, and divide among the stockholders the moneys and other property that shall remain after the payment of debts and other necessary expenses." "Sec. 10. The persons so constituted trustees shall have authority to sue for and recover the debts and property of the dissolved corporation . . . and shall be jointly and severally responsible to the creditors and stockholders of such corporation to the extent of its property and effects that shall come into their hands."

From these sections it would seem that upon the dissolution of this corporation its remaining trustees became vested with the title of its property, and responsible to its creditors and stockholders for the value thereof. By operation of law a vested right of action accrued to all creditors and stockholders immediately on the dissolution, against such trustees, for the value of all property which did or might by the exercise of reasonable diligence come into their hands. This was a liability which after it once attached was beyond the constitutional power of the legislature to release or discharge. *Dash v. Vankleeck*, 7 Johns. 577.

The evidence is undisputed that upon the dissolution, declared by the legislature, the trustees took possession of the railroad property and surrendered its operation to the mortgagees of such railroad. This, in the absence of any objection on the part of creditors or stockholders, they had undoubted authority to do, and the possession of such mortgagees thereafter was the possession of such trustees. They undoubtedly became liable for the value of such property to creditors and stockholders by virtue of such possession, and their authority to administer the assets of the corpo-

ration for the purpose of discharging such liability became fixed by the law existing at the time the liability was incurred. . . .

There can be no valid distinction between property held in trust and that owned by individuals in respect to the protection afforded to it by the Constitution. The reason for its protection is equally strong in either case, and the inviolability of the title is in both cases beyond the reach of legislative action. *Trustees Dartmouth College v. Woodward, supra.*

It then remains for us to consider the validity of the provisions of c. 271 and 310 of the Laws of 1886. We are fully impressed with the importance of this question, and the well-settled principles of construction which require every statute to be so construed as to uphold its constitutionality, if that may be done by a fair and reasonable interpretation of its language.

Another rule, equally well settled, precludes courts from inquiring into the motives of legislatures in making laws, and to consider them simply with reference to their legal effect upon the rights of persons subjected to their operation.

If, however, upon such examination it is found that constitutional rights will be invaded by the operation of the statute, it is the duty of courts to protect them by declaring the invalidity of the statute.

Upon such examination we are of the opinion that c. 271 of the Laws of 1886 is unconstitutional and void. Its provisions show a naked and undisguised attempt to take away from the Broadway Surface Co. and its stockholders and creditors its property, and bestow the benefit thereof upon the municipality of New York. The act attempts to preserve the validity of the consents held by the corporation notwithstanding its dissolution, and directs their sale and transfer to the purchaser, and the payment of the purchase-price to the city.

These consents were the muniments of title to the enjoyment of the rights acquired thereunder by the railroad corporation, and could not be lawfully retained in existence or transferred except by its consent, manifested in some of the ways provided by law. Their possession by any lawful transferee would entitle him to the exercise and use of the rights thereby conferred. The attempt to transfer them to a third party by the mere force of the statute, without the consent or knowledge of their lawful owners, was an effort to change their ownership without due process of law. *Parker v. Browning*, 8 Paige, 388. . . .

The main argument presented to maintain the constitutionality of this act is the assertion that these consents do not constitute property within the usual signification of that term. We have considered that question, and do not agree with the claim. In

view of the fact that the statute expressly contemplates their sale, transfer, and acquisition by a purchaser, it would seem unnecessary to go further to prove the fallacy of such a contention.

These remarks apply with equal force to c. 310. The plaintiff has argued the case upon the assumption that the chapter referred to applies to the Broadway Surface Railroad Co., and should control the proceedings to wind up its affairs. That company was, however, dissolved on January 4, and the act now under consideration was not passed until January 11 thereafter and could not have retroactive effect unless its language expressly required it. We can see no ground for such a contention, unless we look beyond the language of the act and speculate as to the motives of the legislature in passing it. The act does not purport, in terms, to have a retroactive operation, and it is contrary to settled principles to give it such, unless there is something in the language of the act requiring this to be done.

Sec. 1 provides: "Whenever any corporation organized under the laws of this State shall be annulled and dissolved by an act of the legislature, it shall be the duty of the Attorney-General . . . to bring a suit . . . to wind up the affairs of the corporation."

This language looks plainly to prospective cases arising under the act, and those only, and there is nothing in the body of the act to show that the legislature intended it to apply to a dissolution already accomplished. . . .

But, assuming that the act was intended to apply and retroactive effect be given to it, we are of opinion that its material provisions are open to many serious objections which cannot be obviated or reconciled with the provisions of the fundamental law.

A receiver is the representative of the debtor. It is his duty to scrutinize the claims made against the estate and reject and defend against those he believes to be unfounded or illegal. He cannot be impartial in a litigation between himself and creditors as to such claims. A law, therefore, which makes such a party the referee to take the proof of claims, and the judge to determine the materiality of evidence offered in their support, violates a fundamental rule in the administration of justice. No man can be a judge in his own case, and it is immaterial whether he is a party in his own right or as trustee of an express trust; in either event he is a party to the action, interested therein and precluded from acting in a judicial capacity in the determination of such a case. *Nemo debet esse judex in propria causa*. This law is objectionable also because it makes proof of the cost of the obligation the measure of the creditor's recovery, instead of the liability of the debtor as shown by the terms of his contract. And, again,

it requires the creditor to accept payment of an obligation before maturity. The time of payment of a pecuniary obligation is a material provision in such contract, and we know of no authority to require a creditor to accept payment in advance, any more than one to compel such payment by the debtor. Each party has the right to stand on the letter of his contract, and perform it according to its terms. But an objection to this act, even more serious than those considered, is found in the provision for the appointment of a receiver of the property of the dissolved corporation, and the transfer of its assets to him by force of the statute, after the title thereto had become vested in its directors.

It will not be claimed that the appointment of such a receiver by the court in an action against a stranger, without notice to the trustees, in the absence of the authority conferred by c. 310, would confer upon him title to property previously vested in others. *Parker v. Browning, supra*. We cannot see how this case differs from the one supposed. The only authority the court had for making the appointment was derived wholly from the provisions of this act, and the court was not thereby invested with any judicial authority or discretion, except that of designating the holder of the title assumed to be transferred by the act. The court has, by virtue of its general jurisdiction over trusts, authority to appoint to a vacant trusteeship, and perhaps, for cause, to remove fraudulent, dishonest, or incompetent trustees, and appoint others to perform the duties of the trust in order to avoid a failure thereof; but we know of no authority for a court to appoint a receiver of property vested in trustees, without cause and without notice to them, or opportunity afforded to defend their title and possession.

. . . As we have seen, the property of this corporation vested in the persons who were its directors at the time of its dissolution. They took it as trustees for stockholders and creditors, and were not made parties to the action in which the receiver was appointed. No legislation can authorize the appointment of a receiver of the property of A in an action against C, without violating the provisions of the Constitution in relation to the taking of property without due process of law. That the legislature might amend the provisions of the Revised Statutes in relation to the devolution of property of dissolved corporations is indisputable, and if it had done so in the act of dissolution, or previously, it would undoubtedly have prevented the vesting of the property in trustees; but this it did not do, and it had no authority, by mere force of legislative enactment, to take vested property from one individual or trustee and give it to another. *McLean v. Pennington, supra*; *Trustees Dartmouth College v. Woodward, supra*.

These conclusions must result in the condemnation of the

scheme by which it was attempted to wind up the affairs of the Broadway Surface Railroad Co., as the provision for bringing an action by the Attorney-General to wind up its affairs was incidental merely, and so intimately connected with the general plan of the scheme that it cannot be supposed it would have been enacted except in connection with the other provisions of the act. We, therefore, think this law is obnoxious to the objection, that it assumes to take property without due process of law, and impairs the obligation of contracts. The questions as to the rights of the several parties under the traffic contracts are not before us in such form as to authorize us to pass definitely upon them; but we may properly, in this action, determine their validity so far as any objections are made to them by the plaintiff in this action. . . .

There are many other interesting and important questions presented by the briefs of the able counsel for the respective parties which it might be proper to discuss, were it not that the demands made by the claims of practical litigation upon our time are so imperative as to forbid the consideration of abstract and speculative investigations. Such questions must be left to occasions when parties actually aggrieved present them in a litigation where their consideration is essential to the determination of rights. The views expressed lead to a denial of the relief sought in the action by the plaintiff.

The judgments of the Special and General Terms should be reversed and the complaint dismissed, with costs to the defendant other than the receiver.

All concur, except Peckham and Gray, JJ., not sitting.

Andrews and Earl, JJ., concur in the result upon these grounds: 1. The annulling act is constitutional and valid, and its effect was only to take the life of the corporation. 2. All the property of the corporation, including its street franchises and its mortgages and valid contracts, including what are called the traffic contracts with other railway companies, survived. 3. The act c. 271 is unconstitutional. 4. That act and the act c. 310 are parts of the same scheme adopted by the legislature for the purpose of winding up the affairs of the corporation and disposing of and distributing its property. The main features of the latter act are unconstitutional and void, and thus so much of the legislative scheme has failed that there is not enough left to save the whole act from condemnation. 5. As the latter act is thus wholly void, and this action is founded and depends solely upon it, there is no warrant for its maintenance; and, therefore, the judgment should be reversed and complaint dismissed.

All concur.

Judgment accordingly.

NEW YORK & NEW ENGLAND RAILROAD CO. v.
BRISTOLIN THE SUPREME COURT OF THE UNITED STATES, FEBRUARY 5,
1894.*[Reported in 151 United States Reports 556.]*

By sec. 1 of the act of the legislature of Connecticut, of June 19, 1889, c. 220, entitled "An Act relating to Grade Crossings" (Pub. Laws Conn. 1889, p. 134), it was provided:

"The selectmen of any town, the mayor and Common Council of any city, the warden and burgesses of any borough within which a highway crosses or is crossed by a railroad, or the directors of any railroad company whose road crosses or is crossed by a highway, may bring their petition in writing to the railroad commissioners, therein alleging that public safety requires an alteration in such crossing, its approaches, the method of crossing, the location of the highway or crossing, the closing of a highway crossing and the substitution of another therefor, not at grade, or the removal of obstructions to the site of such crossing, and praying that the same may be ordered; whereupon the railroad commissioners shall appoint a time and place for hearing the petition, and shall give such notice thereof as they judge reasonable to said petitioner, the railroad company, the municipalities in which such crossing is situated, and to the owners of the land adjoining such crossing and adjoining that part of the highway to be changed in grade; and after such notice and hearing, said commissioners shall determine what alterations, changes, or removals, if any, shall be made and by whom done; and if the aforesaid petition is brought by the directors of any railroad company, or in behalf of any railroad company, they shall order the expense of such alterations or removals, including the damages to any person whose land is taken, and the special damages which the owner of any land adjoining the public highway shall sustain by reason of any change in the grade of such highway, in consequence of any change, alteration, or removal ordered under the authority of this act, to be paid by the railroad company owning or operating the railroad in whose behalf the petition is brought; and in case said petition is brought by the selectmen of any town, the mayor and Common Council of any city, or the warden and burgesses of any borough, they may, if the highway affected by said determination was in existence when the railroad was constructed over it at grade, or if the layout of the highway was changed for the benefit of the railroad after the layout of the railroad, order an amount

not exceeding one-quarter of the whole expense of such alteration, change, or removal, including the damages, as aforesaid, to be paid by the town, city, or borough in whose behalf the petition is brought, and the remainder of the expense shall be paid by the railroad company owning or operating the road which crosses such public highway; if, however, the highway affected by such order, last mentioned, has been constructed since the railroad which it crosses at grade, the railroad commissioners may order an amount not exceeding one-half of the whole expense of such alteration, change, or removal, including the damages, as aforesaid, to be paid by the town, city, or borough in whose behalf the application is brought, and the remainder of the expense shall be paid by the railroad company owning or operating the road which crosses such public highway. The directors of every railroad company which operates a railroad in this State shall remove or apply for the removal of at least one grade crossing each year for every sixty miles of road operated by it in this State, which crossings, so to be removed, shall be those which in the opinion of said directors are among the most dangerous ones upon the lines operated by it, and if the directors of any railroad company fail so to do, the railroad commissioners shall, if in their opinion the financial condition of the company will warrant, order such crossing or crossings removed as in their opinion the said directors should have applied for the removal of under the above provisions, and the railroad commissioners in so doing shall proceed in all respects as to method of procedure and assessment of expense as if the said directors had voluntarily applied therefor."

Sec. 2 related to alterations of highways, one-fourth of the expense of which was to be paid by the State. Appeal from any decision of the commissioners under the act was specifically provided for.

On September 2, 1890, the railroad commissioners of the State of Connecticut made an order reciting that whereas the directors of the New York & New England Railroad Co. had failed to remove or apply for the removal during the year ending August 1, 1890, of any grade crossing of a highway which crossed or was crossed by their railroad; and whereas in their opinion said directors should have applied for the removal of the grade crossing of their road and the highway known as Main Street in the town of Bristol; and directing a hearing upon the matter, with notice to the railroad company, the town, and the owners of land adjoining that portion of the highway. The hearing was had on several days, from September 24, 1890, to February 11, 1891, and the commissioners, being of opinion that the financial condition of the company warranted the order, and that public safety required

it, ordered the crossing removed, and determined and directed the alterations, changes, and removals to be made and done, and that they be executed by the railroad company at its sole expense, including damages occasioned thereby. The company appealed from this order to the Superior Court of the county of Hartford, the petition for appeal setting forth various grounds therefor, which by voluntary amendment and by direction of the court were reduced to these.¹

The court, upon hearing the parties, the evidence not being preserved in the record, but it appearing that evidence was adduced by the company as to its earnings, expenses, and property, made findings of fact that the railroad company was of sufficient ability to execute, and that the financial condition of the company warranted the order of the commissioners for the removal of the grade crossing in question; that the crossing was among the most dangerous upon the line of the railroad, and that the safety of the public required its removal; and affirmed the order appealed from. Thereupon the company prosecuted an appeal to the Supreme Court of Errors of Connecticut and assigned various errors to the rulings of the Superior Court in amendment of the petition on appeal, and in the exclusion and admission of evidence; and afterward amended its reasons for appeal by adding the following.²

Henry C. Robinson and John J. Jennings for the motions to dismiss or to affirm.

Charles E. Perkins and Edward D. Robbins opposing.

FULLER, Ch. J., after stating the case, delivered the opinion of the court.

The reasons of appeal to the Supreme Court were filed October 7, 1892, and assigned errors in the action of the Superior Court in dealing with various paragraphs of the petition of appeal from the order of the railway commissioners, and in the admission and exclusion of evidence, but contained nothing questioning the constitutionality of the law under which the proceedings were had until they were amended December 17, 1892, by adding the paragraphs raising that question. This tardiness in bringing the contention forward is perhaps not to be wondered at in view of the repeated adjudications of the Supreme Court of Connecticut sustaining the constitutionality of similar laws, as well as of this particular statute, and of the rulings of this court in reference to like legislation.

A motion to dismiss the writ of error for want of jurisdiction is now made, and with it is united a motion to affirm on the ground, in the language of our rule (Rule 6, paragraph 5), "that,

¹ The statement of the grounds of appeal has been omitted.—Ed.

² The additional statement has been omitted.—Ed.

although the record may show that this court has jurisdiction, it is manifest that the writ or appeal was taken for delay only, or that the question on which the jurisdiction depends is so frivolous as not to need further argument."

We agree with counsel that this court has jurisdiction, but are of opinion that the principles to be applied in its exercise are so well settled that further argument is not needed, and that, this being so, the jurisdiction may be said under the circumstances to rest on so narrow a foundation as to give color to the motion to dismiss and justify the disposal of the case on the motion to affirm.

It must be admitted that the act of June 19, 1889, is directed to the extinction of grade crossings as a menace to public safety, and that it is therefore within the exercise of the police power of the State. And, as before stated, the constitutionality of similar prior statutes, as well as of that in question, tested by the provisions of the State and Federal Constitutions, has been repeatedly sustained by the courts of Connecticut. *Woodruff v. Catlin*, 54 Conn. 277, 295; *Westbrook's Appeal*, 57 Conn. 95; *N. Y. & N. E. R. R. Co.'s Appeal*, 58 Conn. 532; *Woodruff v. R. R. Co.*, 59 Conn. 63; *State's Attorney v. Branford*, 59 Conn. 402; *N. Y. & N. E. R. R. v. Waterbury*, 60 Conn. 1; *Middletown v. N. Y., N. H. & H. R. R.*, 62 Conn. 492. *Police power.*

In *Woodruff v. Catlin*, the court, speaking through Pardee, J., said in reference to a similar statute: "The act, in scope and purpose, concerns protection of life. Neither in intent nor fact does it increase or diminish the assets either of the city or of the railroad corporations. It is the exercise of the governmental power and duty to secure a safe highway. The legislature having determined that the intersection of two railways with a highway in the city of Hartford at grade is a nuisance dangerous to life, in the absence of action on the part either of the city or of the railroads, may compel them severally to become the owners of the right to lay out new highways and new railways over such land and in such manner as will separate the grade of the railways from that of the highway at intersection; may compel them to use the right for the accomplishment of the desired end; may determine that the expense shall be paid by either corporation alone or in part by both; and may enforce obedience to its judgment. That the legislature of this State has the power to do all this, for the specified purpose, and to do it through the instrumentality of a commission, it is now only necessary to state, not to argue."

And as to this act, the court, in 58 Conn. 552, on this company's appeal, held that grade crossings were in the nature of nuisances which it was competent for the legislature to cause to be abated,

and that it could, in its discretion, require any party responsible for the creation of the evil, in the discharge of what were in a sense governmental duties, to pay any part, or all, of the expense of such abatement.

It is likewise thoroughly established in this court that the inhibitions of the Constitution of the United States upon the impairment of the obligation of contracts, or the deprivation of property without due process or of the equal protection of the laws, by the States, are not violated by the legitimate exercise of legislative power in securing the public safety, health, and morals. The governmental power of self-protection cannot be contracted away, nor can the exercise of rights granted, nor the use of property, be withdrawn from the implied liability to governmental regulation in particulars essential to the preservation of the community from injury. *Beer Co. v. Massachusetts*, 97 U. S. 25; *Fertilizing Co. v. Hyde Park*, 97 U. S. 659; *Barbier v. Connolly*, 113 U. S. 27; *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650; *Mugler v. Kansas*, 123 U. S. 623; *Budd v. New York*, 143 U. S. 517. And also that "a power reserved to the legislature to alter, amend, or repeal a charter authorizes it to make any alteration or amendment of a charter granted subject to it, which will not defeat or substantially impair the object of the grant, or any rights vested under it, and which the legislature may deem necessary to secure either that object or any public right." *Close v. Greenwood Cemetery*, 107 U. S. 466, 476; *Spring Valley Waterworks v. Schottler*, 110 U. S. 347; *Pennsylvania College Cases*, 13 Wall. 190; *Tomlinson v. Jessup*, 15 Wall. 454.

amendment

The charter of this company was subject to the legislative power over it of amendment, alteration, or repeal, specifically and under general law. *Priv. & Spec. Laws Conn.*, vol. 5, pp. 543, 547; vol. 7, p. 466; vol. 8, p. 353; *Spec. Laws Conn.* 1881, p. 64; *Stats.* 1875, 278; *Gen. Stats.* 1888, § 1909; *N. Y. & N. E. R. R. v. Waterbury*, 60 Conn. 1.

The contention seems to be, however, that the legislature, in discharging the duty of the State to protect its citizens, has authorized by the enactment in question that to be done which is, in certain particulars, so unreasonable and so obviously unjustified by the necessity invoked as to bring the act within constitutional prohibitions.

The argument is that the existing grades of railroad crossings were legally established, in accordance with the then wishes of the people, but, with the increase in population, crossings formerly safe had become no longer so; that the highways were chiefly for the benefit of the local public, and it was the duty of the local municipal corporation to keep them safe; that this law applied to

railroad corporations treatment never accorded to other citizens in allowing the imposition of the entire expense of change of grade, both costs and damages, irrespective of benefits, on those companies, and in that respect, and in the exemption of the town from its just share of the burden, denied to them the equal protection of the laws.

And further, that the order, and, therefore, the law which was held to authorize it, amounted to a taking of property without due process, in that it required the removal of tracks many feet from their present location, involving the destruction of much private property; the excavation of the principal highway and those communicating; and the building of an expensive iron bridge, all at the sole expense, including damages, of the company, without a hearing as to the extent of the several responsibilities of the company and the town, or as to the expense of the removal of this dangerous crossing as compared with other dangerous crossings, or of the degree of the responsibility of the company for the dangers existing at this particular crossing. The objection is not that hearing was not required and accorded, which it could not well be in view of the protracted proceedings before the commissioners and the Superior Court and the review in the Supreme Court, but that the scope of inquiry was not as broad as the statute should have allowed, and that the particular crossing to be removed was authorized to be prejudged.

It is further objected that the Supreme Court had so construed the statute that upon the issue whether the financial condition of the company warranted the order, no question of law could be raised as to the extent of the burdens, which a certain amount of financial ability would warrant, and thus in that aspect, by reason of the large amount of expenditure which might be, and as matter of fact was in this instance, required, the obligation of the contracts made by the company with the holders of its securities was impaired. Complaint is made in this connection of the striking out by the Superior Court of certain paragraphs of the petition on appeal, held by that court and the Supreme Court to plead mere matters of evidence, and the decision by the Supreme Court that all the material issues were met by the findings. Those issues were stated by the court to be, whether or not the company's directors had removed or applied for the removal of a grade crossing as required by the statute; whether or not the grade crossing ordered by the commissioners to be removed was in fact a dangerous one which the directors ought to have removed, or for the removal of which the directors ought to have applied; and whether or not the company's financial condition was such as to warrant the order.

And upon these premises it is urged in addition that the right to amend the charter of the corporation was not controlling, because that did not include the right to arbitrarily deprive the stockholders of their property, which, though held by them, for purposes of management and control, under a corporate organization created by special law, was, nevertheless, private property, not by virtue of the charter, but "by force of the most fundamental and general laws of modern society, which from their nature necessarily protect alike and fully all legitimate acquisitions of the members of the community, no matter whether held by them as individuals, or partnerships, or associations, or corporations."

The Supreme Court of Connecticut held that the statute operated as an amendment to the charters of the railroad corporations affected by it; that as grade crossings are in the nature of nuisances, the legislature had a right to cause them to be abated, and to require either party to pay the whole or any portion of the expense; that the statute was not unconstitutional in authorizing the commissioners to determine their own jurisdiction, and that, besides, the right of appeal saved the railroad companies from any harm from their findings; that it was the settled policy of the State to abolish grade crossings as rapidly as could be reasonably done; and that all general laws and police regulations affecting corporations were binding upon them without their assent.

We are asked upon the grounds above indicated to adjudge that the highest tribunal of the State in which these proceedings were had, committed, in reaching these conclusions, errors so gross as to amount in law to a denial by the State of rights secured to the company by the Constitution of the United States, or that the statute itself is void by reason of infraction of the provisions of that instrument.

But this court cannot proceed upon general ideas of the requirements of natural justice apart from the provisions of the Constitution supposed to be involved, and in respect of them we are of opinion that our interposition cannot be successfully invoked.

As observed by Miller, J., in *Davidson v. New Orleans*, 96 U. S. 97, 104, the Fourteenth Amendment cannot be availed of "as a means of bringing to the test of the decision of this court the abstract opinions of every unsuccessful litigant in the State court of the justice of the decision against him, and of the merits of the legislation on which such a decision may be founded." To use the language of Field, J., in *Missouri Pacific R. R. v. Humes*, 115 U. S. 512, 520, "it is hardly necessary to say that the hardship, impolicy, or injustice of State laws is not necessarily an objection to their constitutional validity; and that the

remedy for evils of that character is to be sought from State legislatures."

The conclusions of this court have been repeatedly announced to the effect that though railroad corporations are private corporations as distinguished from those created for municipal and governmental purposes, their uses are public, and they are invested with the right of eminent domain, only to be exercised for public purposes; that therefore they are subject to legislative control in all respects necessary to protect the public against danger, injustice, and oppression; that the State has power to exercise this control through boards of commissioners; that there is no unjust discrimination and no denial of the equal protection of the laws in regulations applicable to all railroad corporations alike; nor is there necessarily such denial nor an infringement of the obligation of contracts in the imposition upon them in particular instances of the entire expense of the performance of acts required in the public interest, in the exercise of legislative discretion; nor are they thereby deprived of property without due process of law, by statutes under which the result is ascertained in a mode suited to the nature of the case, and not merely arbitrary and capricious; and that the adjudication of the highest court of a State, that, in such particulars, a law enacted in the exercise of the police power of the State is valid, will not be reversed by this court on the ground of an infraction of the Constitution of the United States. Nashville, etc., *R. R. v. Alabama*, 128 U. S. 96; *Georgia Railroad & Banking Co. v. Smith*, 128 U. S. 174; *Minneapolis, etc., R. R. v. Beckwith*, 129 U. S. 26; *Dent v. West Virginia*, 129 U. S. 114; *Charlotte, Columbia, etc., R. R. v. Gibbes*, 142 U. S. 386; *Minneapolis & St. Louis R. R. v. Emmons*, 149 U. S. 364.

Judgment affirmed.

REAGAN v. FARMERS' LOAN AND TRUST CO.

IN THE SUPREME COURT OF THE UNITED STATES, MAY 26, 1894.

[Reported in 154 *United States Reports* 362.]

ON April 3, 1891, the legislature of the State of Texas passed an act to establish a railroad commission.¹

After the commission had organized on June 10, it proceeded to establish certain rates for the transportation of goods over the railroads in the State, and also certain regulations for the man-

¹ Neither statement of facts nor the opinion is given in full.—Ed.

agement of such transportation. Thereafter, on April 30, 1892, the Farmers' Loan and Trust Co. filed its bill in the Circuit Court of the United States for the Western District of Texas, making as defendants the railroad commissioners, the Attorney-General, the International & Great Northern Railroad Co., and Thomas M. Campbell, the receiver thereof, duly appointed by the District Court of Smith County, Texas. That bill, which is too long to be copied in full, alleged that the plaintiff was the trustee in a trust deed executed by the railroad company on the 15th day of June, 1881, to secure a second series of bonds, aggregating \$7,054,000, bearing interest at the rate of 6 per cent. per annum; and that there was a prior issue of bonds to the amount of \$7,954,000, secured by a conveyance to John S. Kennedy and Samuel Sloan, as trustees. It then set forth the railroad commission act heretofore referred to, or so much thereof as was deemed material, the proceedings of the commission, and the notices that were given to the railroad company, and attached as exhibits the several orders prescribing rates and regulations. It also averred generally that such rates were unreasonable and unjust, set forth certain specific facts which it claimed established the injustice and unreasonableness of those rates, and prayed a decree restraining the commission from enforcing those rates, or any other rates, and also restraining the Attorney-General from instituting any suits to recover penalties for failing to conform to such rates and obey such regulations. The International & Great Northern Railroad Co. appeared, filed an answer and also a cross-bill similar in its scope and effect to the bill filed by the plaintiff, and praying substantially the same relief. The railroad commission and the Attorney-General at first filed answers, but, after a certain amount of testimony had been taken (of the nature and extent of which we are not advised, inasmuch as it is not preserved in the record), they withdrew their answers and filed demurrers, leave being given at the same time to the complainant and cross-complainant to amend the bill and cross-bill before the filing of the demurrer. The amendments to the bill and cross-bill were similar, and contained allegations more in detail of the losses in revenue sustained by the company through the enforcement of the tariffs, and the average reduction caused by such tariffs in the rate theretofore existing; and also setting forth certain contract rights under an act of the legislature of the State of Texas, passed on February 7, 1853. Thereafter the cause was submitted to the court on the bills and cross-bills and demurrers, and on March 23, 1893, a decree was entered in favor of the plaintiff as follows: "This cause having been set down for final hearing on the pleadings and evidence, and being called for hearing thereon, the

defendants, John H. Reagan, William P. McLean, L. L. Foster, and Charles A. Culberson, presented their motion, on file herein, for leave to withdraw their answers and file demurrers, which motion was granted conditioned upon the said defendants paying all costs of taking depositions and evidence, herein against them to be taxed, and for which execution may issue, and on condition that the complainant and cross-complainant have leave to amend before the filing of the demurrers of the said defendants, which leave was granted, and whereupon said amendments were filed, and the demurrers of the said defendants were filed to the original bill of complaint and cross-bill in this cause, as also to all amendments thereto, and were, by complainant and cross-complainant, set down for argument by consent, and were by all parties forthwith submitted; and thereupon, in consideration thereof, it was ordered, adjudged, and decreed that said demurrers be, and the same are hereby, overruled; and the defendants, John H. Reagan, William P. McLean, L. L. Foster, and Charles A. Culberson, having entered of record their refusal to make further answer, and the fact that they stood upon their demurrers, and all parties submitting the cause for final decree, it is now, upon consideration thereof, ordered, adjudged, and decreed that the bill of complaint as amended, and the cross-bill of complainant as amended, in the above-entitled cause, be, and the same are hereby, sustained and taken for confessed. And the said cause coming on further to be heard upon the bill of complaint herein as amended, and upon the answer of the defendant railroad company thereto, confessing the same, it is further ordered, adjudged, and decreed as follows, to wit:

"First. That the injunctions heretofore issued in this cause be, and the same are hereby, made perpetual, and accordingly.

"Second. That defendant, the International & Great Northern Railroad Co., be, and it is hereby, perpetually enjoined, restrained, and prohibited from putting or continuing in effect the rates, tariffs, circulars, or orders of the railroad commission of Texas, or either or any of them, as described in the bill of complaint herein and in 'Exhibit C' thereto and therewith filed, and from charging or continuing to charge the rates specified in said tariffs, circulars, or orders, or either or any of them.

"Third. It is further ordered, adjudged, and decreed that the defendants, the railroad commission of Texas, and the defendants, John H. Reagan, William P. McLean, and L. L. Foster, acting as the railroad commission of Texas, and their successors in office, and the defendant, Charles A. Culberson, acting as Attorney-General of the State of Texas, and his successors in office, be, and they are hereby, perpetually enjoined, restrained, and prohibited

from instituting or authorizing or directing any suit or suits, action or actions, against the defendant railroad company for the recovery of any penalties under and by virtue of the provisions of the act of the legislature of the State of Texas, approved April 3, 1891, and fully described in the bill of complaint; or under or by virtue of any of the said tariffs, orders, or circulars of the said railroad commission of Texas, or any or either of them, or under or by virtue of the said act and the said tariffs, orders, or circulars of said railroad commission, or any or either of them combined, and said defendants Reagan, McLean, and Foster, and the railroad commission of Texas are further perpetually restrained from certifying any copy or copies of any of said orders, tariffs, or circulars, or from delivering, or causing or permitting to be delivered, certified copies of any of said orders, tariffs, or circulars to the said Culberson, or any other party, and from furnishing the said Culberson, or any other party, any information of any character for the purpose of inducing, enabling, or aiding him or any other party to institute or prosecute any suit or suits against the said defendant railroad company for the recovery of any penalty or penalties under the said act.

"Fourth. It is further ordered, adjudged, and decreed that the said railroad commission of Texas and the said Reagan, McLean, and Foster be perpetually enjoined, restrained, and prohibited from making, issuing, or delivering to the said railroad company, or causing to be made, issued, or delivered to it, any further tariff or tariffs, circular or circulars, order or orders.

"Fifth. It is further ordered, adjudged, and decreed that all other individuals, persons, or corporations be, and they are hereby, perpetually enjoined, restrained, and prohibited from instituting or prosecuting any suit or suits against the said railroad company for the recovery of any damages, overcharges, penalty, or penalties, under or by virtue of the said act or any of its provisions, or under and by virtue of the said tariffs, orders, or circulars of the said railroad commission of Texas, or any or either of them, or under and by virtue of the said act and the said tariffs, orders, and circulars, or any or either of them combined.

"Sixth. It is further ordered, adjudged, and decreed that all rates, tariffs, circulars, and orders heretofore made and issued by said commission, and fully described in 'Exhibit C' to the bill of complaint herein, be, and they are hereby, declared to be unreasonable, unfair, and unjust as to complainant and cross-complainant, and they are hereby cancelled and declared to be null, void, and of no effect.

"Seventh. It is further ordered, adjudged, and decreed that all costs herein be taxed against said defendants Reagan, McLean,

Culberson, and Foster, and the railroad commission of Texas, and that execution may issue therefor."

From that decree the railroad commission and the Attorney-General have appealed to this court.

Charles A. Culberson, Attorney-General of the State of Texas, for appellants.

John F. Dillon and *E. B. Kruttschnitt*, with whom were *Herbert B. Turner* and *John J. McCook* on the brief, for appellee.

Alexander G. Cochran, *Winslow S. Pierce*, and *R. S. Lovell* filed a brief for the International & Great Northern Railroad Co., cross-complainant and appellee.

J. W. Terry and *George W. Peck* filed a brief in the interest of the Gulf, Colorado & Santa Fé Railroad Co.

Henry C. Coke, with whom was *W. S. Simkins* on the brief, closed for appellants.

BREWER, J., after stating the case, delivered the opinion of the court.

The questions in this case are of great importance, and have been most ably and satisfactorily discussed by counsel for the respective parties. . . .

Passing from the question of jurisdiction to the act itself, there can be no doubt of the general power of a State to regulate the fares and freights which may be charged and received by railroad or other carriers, and that this regulation can be carried on by means of a commission. Such a commission is merely an administrative board created by the State for carrying into effect the will of the State as expressed by its legislation. Railroad Commission Cases, 116 U. S. 307. No valid objection, therefore, can be made on account of the general features of this act; those by which the State has created the railroad commission and entrusted it with the duty of prescribing rates of fares and freights as well as other regulations for the management of the railroads of the State.

Specific objections are made to the act, on the ground that, by sec. 5, the rates and regulations made by the commission are declared conclusive in all actions between private individuals and the companies, and that by sec. 14 excessive penalties are imposed upon railroad corporations for any violation of the provisions of the act; and thus, as claimed, there is not only a limitation but a practical denial to railroad companies of the right of a judicial inquiry into the reasonableness of the rates prescribed by the commission. The argument is, in substance, that railroad companies are bound to submit to the rates prescribed until in a direct proceeding there has been a final adjudication that the rates are unreasonable, which final adjudication, in the nature of things, can-

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not be reached for a length of time; that meanwhile a failure to obey those regulations exposes the company, for each separate fare or freight exacted in excess of the prescribed rates, to a penalty so enormous as in a few days to roll up a sum far above the entire value of the property; that even if in a direct proceeding the rates should be adjudged unreasonable, there is nothing to prevent the commission from re-establishing rates but slightly changed and still unreasonable, to set aside which requires a new suit, with its length of delay; and thus, as is claimed, the railroad companies are tied hand and foot and bound to submit to whatever illegal, unreasonable, and oppressive regulations may be prescribed by the commission.

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It is enough to say in respect to these matters, at least so far as this case is concerned, that it is not to be supposed that the legislature of any State, or a commission appointed under the authority of any State, will ever engage in a deliberate attempt to cripple or destroy institutions of such great value to the community as the railroads, but will always act with the sincere purpose of doing justice to the owners of railroad property, as well as to other individuals; and also that no legislation of a State, as to the mode of proceeding in its own courts, can abridge or modify the powers existing in the Federal courts, sitting as courts of equity. So that if in any case there should be any mistaken action on the part of a State, or its commission, injurious to the rights of a railroad corporation, any citizen of another State, interested directly therein, can find in the Federal court all the relief which a court of equity is justified in giving. We do not deem it necessary to pass upon these specific objections because the fourteenth section or any other section prescribing penalties may be dropped from the statute without affecting the validity of the remaining portions; and if the rates established by the commission are not conclusive, they are at least *prima facie* evidence of what is reasonable and just. For the purpose of this case it may be conceded that both the clauses are unconstitutional, and still the great body of the act remains unchallenged—that which establishes the commission, and empowers it to make reasonable rates and regulations for the control of railroads. It is familiar law that one section or part of an act may be invalid without affecting the validity of the remaining portion of the statute. Any independent provision may be thus dropped out if that which is left is fully operative as a law, unless it is evident from a consideration of all the sections that the legislature would not have enacted that which is within independently of that beyond its power.

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Applying this rule, the invalidity of these two provisions may be conceded without impairing the force of the rest of the act.

The creation of a commission, with power to establish rules for the operation of railroads and to regulate rates, was the prime object of the legislation. This is fully accomplished whether any penalties are imposed for a violation of the rules prescribed, or whether the rates shall be conclusive or simply *prima facie* evidence of what is just and reasonable. The matters of penalty and the effect as evidence of the rates are wholly independent of the rest of the statute. Neither can it be supposed that the legislature would not have established the commission and given it power over railroads without these independent matters. // In other words, it is not to be presumed that the legislature was legislating for the mere sake of imposing penalties, but the penalties and the provision, as to evidence, were simply in aid of the main purpose of the statute. They may fail, and still the great body of the statute have operative force, and the force contemplated by the legislature in its enactment. Take a similar body of legislation—a tax law. There may be incorporated into such a law a provision giving conclusive effect to tax deeds, and also a provision as to the penalties incurred by non-payment of taxes. These two provisions may, for one reason or another, be obnoxious to constitutional objections. If so, they may be dropped out, and the balance of the statute exist. It would not for a moment be presumed that the whole tax system of the State depended for its validity upon the penalties for non-payment of taxes or the effect to be given to the tax deed. We, therefore, for the purposes of this case, assume that these two provisions of the statute are open to the constitutional objections made against them. We do not mean by this to imply that they are so in fact, but simply that it is unnecessary to consider and determine the matter, and we leave it open for future consideration.

It appears from the bill that, in pursuance of the powers given to it by this act, the State commission has made a body of rates for fares and freights. This body of rates, as a whole, is challenged by the plaintiff as unreasonable, unjust, and working a destruction of its rights of property. The defendant denies the power of the court to entertain an inquiry into that matter, insisting that the fixing of rates for carriage by a public carrier is a matter wholly within the power of the legislative department of the Government and beyond examination by the courts.

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It is doubtless true, as a general proposition, that the formation of a tariff of charges for the transportation by a common carrier of persons or property is a legislative or administrative rather than a judicial function. Yet it has always been recognized that, if a carrier attempted to charge a shipper an unreasonable sum, the courts had jurisdiction to inquire into that matter and to

award to the shipper any amount exacted from him in excess of a reasonable rate; and also in a reverse case to render judgment in favor of the carrier for the amount found to be a reasonable charge. The province of the courts is not changed, nor the limit of judicial inquiry altered, because the legislature instead of the carrier prescribes the rates. The courts are not authorized to revise or change the body of rates imposed by a legislature or a commission; they do not determine whether one rate is preferable to another, or what under all circumstances would be fair and reasonable as between the carriers and the shippers; they do not engage in any mere administrative work; but still there can be no doubt of their power and duty to inquire whether a body of rates prescribed by a legislature or a commission is unjust and unreasonable, and such as to work a practical destruction to rights of property, and if found so to be, to restrain its operation. In *Chicago, Burlington & Quincy Railroad v. Iowa*, 94 U. S. 155, and *Peik v. Chicago & Northwestern Railroad*, 94 U. S. 164, the question of legislative control over railroads was presented, and it was held that the fixing of rates was not a matter within the absolute discretion of the carriers, but was subject to legislative control. As stated by Miller, J., in *Wabash, etc., Railway v. Illinois*, 118 U. S. 557, 569, in respect to those cases:

"The great question to be decided, and which was decided, and which was argued in all those cases, was the right of the State, within which a railroad company did business, to regulate or limit the amount of any of these traffic charges."

There was in those cases no decision as to the extent of control, but only as to the right of control. This question came again before this court in *Railroad Commission Cases*, 116 U. S. 307, 331, and while the right of control was reaffirmed, a limitation on that right was plainly intimated in the following words of the Chief Justice:

limit | "From what has thus been said, it is not to be inferred that this power of limitation or regulation is itself without limit. This power to regulate is not a power to destroy, and limitation is not the equivalent of confiscation. Under pretense of regulating fares and freights, the State cannot require a railroad corporation to carry persons or property without reward; neither can it do that which in law amounts to a taking of private property for public use without just compensation, or without due process of law."

This language was quoted in the subsequent case of *Dow v. Beidelman*, 125 U. S. 680, 689. Again, in *Chicago & St. Paul Railway v. Minnesota*, 134 U. S. 418, 458, it was said by Blatchford, J., speaking for the majority of the court:

"The question of the reasonableness of a rate of charge for

transportation by a railroad company, involving as it does the element of reasonableness, both as regards the company and as regards the public, is eminently a question for judicial investigation, requiring the process of law for its determination."

And in *Chicago & Grand Trunk Railway v. Wellman*, 143 U. S. 339, 344, is this declaration of the law:

"The legislature has power to fix rates, and the extent of judicial interference is protection against unreasonable rates."

Budd v. New York, 143 U. S. 517, announces nothing to the contrary. The question there was not whether the rates were reasonable, but whether the business, that of elevating grain, was within legislative control as to the matter of rates. It was said in the opinion: "In the cases before us, the records do not show that the charges fixed by the statute are unreasonable." Hence there was no occasion for saying anything as to the power or duty of the courts in case the rates as established had been found to be unreasonable. It was enough that upon examination it appeared that there was no evidence upon which it could be adjudged that the rates were in fact open to objection on that ground.

These cases all support the proposition that while it is not the province of the courts to enter upon the merely administrative duty of framing a tariff of rates for carriage, it is within the scope of judicial power and a part of judicial duty to restrain anything which, in the form of a regulation of rates, operates to deny to the owners of property invested in the business of transportation that equal protection which is the constitutional right of all owners of other property. There is nothing new or strange in this. It has always been a part of the judicial function to determine whether the act of one party (whether that party be a single individual, an organized body, or the public as a whole) operates to divest the other party of any rights of person or property. In every constitution is the guarantee against the taking of private property for public purposes without just compensation. The equal protection of the laws which, by the Fourteenth Amendment, no State can deny to the individual, forbids legislation, in whatever form it may be enacted, by which the property of one individual is, without compensation, wrested from him for the benefit of another, or of the public. This, as has been often observed, is a government of law, and not a government of men, and it must never be forgotten that under such a government, with its constitutional limitations and guarantees, the forms of law and the machinery of government, with all their reach and power, must in their actual workings stop on the hither side of the unnecessary and uncompensated taking or destruction of any private property, legally acquired and legally held. It was, therefore,

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within the competency of the Circuit Court of the United States for the Western District of Texas, at the instance of the plaintiff, a citizen of another State, to enter upon an inquiry as to the reasonableness and justice of the rates prescribed by the railroad commission. Indeed, it was in so doing only exercising a power expressly named in the act creating the commission.

A classification was made by the commission, and different rates established for different kinds of goods. These rates were prescribed by successive circulars. Classification of rates is based on several considerations, such as bulk, value, facility of handling, etc.; it is recognized in the management of all railroads, and no complaint is here made of the fact of classification, or the way in which it was made by the commission. By these circulars rates all along the line of classification were reduced from those theretofore charged on the road. The challenge in this case is of the tariff as a whole, and not of any particular rate upon any single class of goods. As we have seen, it is not the function of the courts to establish a schedule of rates. It is not, therefore, within our power to prepare a new schedule or rearrange this. Our inquiry is limited to the effect of the tariff as a whole, including therein the rates prescribed for all the several classes of goods, and the decree must either condemn or sustain this act of *quasi* legislation. If a law be adjudged invalid, the court may not in the decree attempt to enact a law upon the same subject which shall be obnoxious to no legal objections. It stops with simply passing its judgment on the validity of the act before it. The same rule obtains in a case like this. . . .

And now, what deductions are fairly to be drawn from all the facts before us? Is there anything which detracts from the force of the general allegation that these rates are unjust and unreasonable? This clearly appears. The cost of this railroad property was \$40,000,000; it cannot be replaced to-day for less than \$25,000,000. There are \$15,000,000 of mortgage bonds outstanding against it, and nearly \$10,000,000 of stock. These bonds and stock represent money invested in the construction of this road. The owners of the stock have never received a dollar's worth of dividends in return for their investment. The road was thrown into the hands of a receiver for default in payment of the interest on the bonds. The earnings for the last three years prior to the establishment of these rates was insufficient to pay the operating expenses and the interest on the bonds. In order to make good the deficiency in interest the stockholders have put their hands in their pockets and advanced over a million of dollars. The supplies for the road have been purchased at as cheap a rate as possible. The officers and employees have been paid no more than is necessary

to secure men of the skill and knowledge requisite to suitable operation of the road. By the voluntary action of the company the rate in cents per ton per mile has decreased in ten years from 2.03 to 1.30. The actual reduction by virtue of this tariff in the receipts during the six or eight months that it has been enforced amounts to over \$150,000. Can it be that a tariff which under these circumstances has worked such results to the parties whose money built this road is other than unjust and unreasonable? Would any investment ever be made of private capital in railroad enterprises with such as the proffered results?

It is unnecessary to decide, and we do not wish to be understood as laying down as an absolute rule, that in every case a failure to produce some profit to those who have invested their money in the building of a road is conclusive that the tariff is unjust and unreasonable. And yet justice demands that every one should receive some compensation for the use of his money or property, if it be possible without prejudice to the rights of others. There may be circumstances which would justify such a tariff; there may have been extravagance and a needless expenditure of money; there may be waste in the management of the road; enormous salaries, unjust discrimination as between individual shippers, resulting in general loss. The construction may have been at a time when material and labor were at the highest price, so that the actual cost far exceeds the present value; the road may have been unwisely built, in localities where there is no sufficient business to sustain a road. Doubtless, too, there are many other matters affecting the rights of the community in which the road is built as well as the rights of those who have built the road.

But we do hold that a general averment in a bill that a tariff as established is unjust and unreasonable, is supported by the admitted facts that the road cost far more than the amount of the stock and bonds outstanding; that such stock and bonds represent money invested in its construction; that there has been no waste or mismanagement in the construction or operation; that supplies and labor have been purchased at the lowest possible price consistent with the successful operation of the road; that the rates voluntarily fixed by the company have been for ten years steadily decreasing until the aggregate decrease has been more than 50 per cent; that under the rates thus voluntarily established, the stock, which represents two-fifths of the value, has never received anything in the way of dividends, and that for the last three years the earnings above operating expenses have been insufficient to pay the interest on the bonded debt, and that the proposed tariff, as enforced, will so diminish the earnings that they will not be able to pay one-half the interest on the bonded debt above the oper-

ating expenses; and that such an averment so supported will, in the absence of any satisfactory showing to the contrary, sustain a finding that the proposed tariff is unjust and unreasonable, and a decree reversing it being put in force.

It follows from these considerations that the decree as entered must be reversed in so far as it restrains the railroad commission from discharging the duties imposed by this act, and from proceeding to establish reasonable rates and regulations; but must be affirmed so far only as it restrains the defendants from enforcing the rates already established. The costs in this court will be divided.

PEARSALL v. GREAT NORTHERN RAILWAY CO.

IN THE SUPREME COURT OF THE UNITED STATES, MARCH 30,
1896.

[*Reported in 161 United States Reports 646.*]

THIS was a bill in equity filed by Pearsall, a stockholder in the Great Northern Railway, against the company, which is a corporation created and existing under the laws of the Territory and State of Minnesota, and a citizen of that State, to enjoin it from entering into and carrying out a certain agreement between that company and the holders of bonds secured by the second and third general mortgages, and the consolidated mortgage of the Northern Pacific Railroad Co., under which, upon a sale and foreclosure of the mortgages given to secure such bonds, the holders were to purchase or cause to be purchased the property and franchises of the Northern Pacific Railroad Co.

Plaintiff set up that he was the holder of five hundred shares of \$100 each of the preferred paid-up stock of the defendant corporation; that such stock is of the value of more than \$125 per share, but that the proposed arrangement, if consummated, would decrease the value of his stock and damage him to an amount exceeding \$5000. The suit was brought for the benefit of the plaintiff and all stockholders similarly situated. The facts as they appear in the bill and answer, upon which the case was heard, are substantially as follows:

The defendant, the Great Northern Railway, is a corporation organized and existing under the act of the legislature of the Territory of Minnesota of March 1, 1856, c. 160, Gen. Laws 1856, 294, to incorporate the Minneapolis & St. Paul Railroad Co., and a number of amendatory acts not necessary to be noticed

in detail. By the original act, the Territory granted to the railroad company (§ 1) the right to be a corporation, the right to acquire by purchase, gift, grant, devise, or otherwise, and to hold and to convey all such property, real and personal, which should be necessary or convenient to carry into effect the objects and purposes of the corporation; the right (§ 2) to construct and operate a railroad from Minneapolis to St. Cloud (about 75 miles), and also to a point at or near the mouth of the St. Louis River (about 180 miles), with the further power (§ 6) to connect its road by branches with any other road in the Territory, or to become part owner or lessee of any railroad in said Territory, and also (§ 12) "to connect with any railroad running in the same direction with this road, and where there may be any portion of another road which may be used by this company."

By § 17 "this act is hereby declared to be a public act, and may be amended by any subsequent legislative assembly, in any manner not destroying or impairing the vested rights of said corporation."

By the amendatory act passed by the legislature of the State, of February 28, 1865, c. 4, Special Laws of 1865, p. 27, such corporation (§ 3, amendatory of original § 12) was authorized "to connect with or adopt as its own . . . any other railroad running in the same general direction with either of its main lines or any branch roads, and which said corporation is authorized to construct;" (§ 8) "to consolidate the whole or any portion of its capital stock with the capital stock or any portion thereof of any other road . . . having the same general direction or location, or to become merged therein by way of substitution;" the further right (§ 9) to consolidate any portion of its road and property with the franchise of any other railroad company or any portion thereof, and (§ 12) to consolidate the whole or any portion of its main line or branches with the rights, powers, franchises, grants, and effects of any other railroad.

It is alleged in the bill and admitted by the answer that these several acts, with their rights, privileges, and franchises, were duly accepted, and that the same have ever since remained in full force and effect; that prior to 1880, the company constructed and put into operation that portion of its line which extended from St. Cloud eastwardly to the town of Hinckley, in the State of Minnesota, and that in 1889 it changed its name to the Great Northern Railway Co., which name it has ever since borne and now bears; that by various purchases, consolidations, and leases, it now operates and controls all the lines of the Great Northern Railway Co. extending from St. Paul and Duluth in the State of Minnesota, and from Superior in the State of Wisconsin, across

the States of Minnesota, North Dakota, Montana, and Idaho, to the towns of Everett and Seattle in the State of Washington, with many branch and connecting lines, none of which, however, reaches Tacoma in the State of Washington, Portland in the State of Oregon, or Winnipeg in the Dominion of Canada. All of these different lines comprise an aggregate mileage of nearly forty-five hundred miles, and are operated as a combined railway system, under the name of the Great Northern Railway.

The Northern Pacific Railroad Co. is a corporation organized and existing under certain acts and resolutions of Congress, and owns some, and, through its receivers, controls and operates all the lines of the Northern Pacific Railroad system, extending from St. Paul in Minnesota and from Ashland in Wisconsin to Tacoma in the State of Washington and Portland in the State of Oregon, with many branches and connecting lines, one of which extends to Winnipeg in Canada; that the aggregate mileage of the Northern Pacific system is nearly forty-five hundred miles, and some of the lines of each of these systems are parallel to and some competing with the lines of the other system; that the Northern Pacific Railroad Co. is insolvent, its road in the hands of receivers appointed by the court at the instance of the bondholders under the second, third, and consolidated mortgages. The trustee for these bondholders has commenced suits to foreclose these mortgages, and the receivers are in possession under appointment in these foreclosure suits.

The defendant and the holders of a majority of the outstanding bonds of these mortgages of the Northern Pacific Railroad Co. have entered into an arrangement or agreement by which the property shall be sold to a committee of the bondholders, who are to organize a new corporation, subject to the prior mortgages, which shall issue its bonds to the aggregate amount of \$100,000,000, or more, payment of which is to be guaranteed by the Great Northern, and capital stock to the further amount of \$100,000,000, one-half of which is to be transferred to the shareholders of the Great Northern, and shall enter into a traffic contract with it, whereby in substance the two companies shall thereafter exchange traffic at all intersecting and connecting points, and divide the common earnings from such exchanged traffic on the basis of miles hauled on the systems respectively. This arrangement is fully set forth in the answer, a copy of which in that particular is printed in the margin.¹

¹ I. The holders of the said several classes of bonds shall obtain a decree of foreclosure in said actions and for the sale of the railroad properties and franchises of the Northern Pacific Railroad Company, including its franchises to be a corporation, subject to the said divisional and general

Plaintiff claims that this agreement is unlawful and in violation of the act of March 9, 1874, General Laws of Minnesota for 1874, c. 29, which provides that "no railroad corporation or the lessees, purchasers or managers of any railroad corporation shall consolidate the stock, property, or franchises of such corporation with, or lease, or purchase the works or franchises of, or in any way control any other railroad corporations owning or having under its control a parallel or competing line; nor shall any officer of such railroad corporation act as the officer of any other railroad corporation owning or having the control of a

first mortgages mentioned in paragraph ten of the bill, and shall cause the same to bid in and be purchased by a committee of bondholders or their agents for the benefit of all the holders of said outstanding bonds secured by the mortgages so foreclosed, and shall cause a reorganization of the said railway franchises and property as a new corporation, either under the said acts and joint resolutions of Congress relating to the Northern Pacific Railroad Company or under some other proper and sufficient legislation of the United States, or of some one or more States.

2. Upon such foreclosure sale and reorganization the reorganized company may issue its bonds to an amount in the aggregate of \$100,000,000 or over and its full paid capital stock of \$100,000,000, this defendant to guarantee, for the benefit of the holders of such bonds, the payment of the principal thereof, together with interest thereon to an amount in the aggregate of such interest, guarantee not to exceed \$6,200,000 per year, which guarantee shall, if required by said reorganization company, be written and executed upon the back of each of said bonds.

3. Among other good and valuable considerations for such guarantee, and as a compensation for the risk to the stockholders of the defendant company, which may result by reason of said guarantee in the way of a possible diversion of a portion of the earnings of the defendant to make good its guarantee, the said reorganized company shall transfer, or cause or procure to be transferred by its stockholders, to the shareholders of the defendant company, or to some person or corporation as trustee for their use, one-half part of the capital stock of said reorganized company.

4. The Northern Pacific Company shall join with the defendant in providing reasonable and adequate facilities for an interchange of cars and traffic between their respective lines, and shall interchange traffic with defendant and operate its trains to that end upon reasonable, fair, and lawful terms under joint tariffs or otherwise.

5. The defendant shall have the right to bill and route its traffic, passengers, and freight from points on its line by way of such connections as now exist or may hereafter be constructed between said line and the Northern Pacific Company to Winnipeg, Tacoma, Portland, and all points in the different States through which the line of the Northern Pacific Railroad extends and not reached by the line of this defendant.

6. The defendant shall have the right to make use of the depot and terminal facilities of the Northern Pacific Company at Spokane Falls and other points, where such use shall be found to be convenient and economical, jointly with that company, and upon reasonable, fair, and lawful terms, which shall insure to the defendant a large saving on the cost and expense which it must otherwise necessarily incur in constructing and operating depots and terminals of its own.

parallel or competing line; and the question whether railroads are parallel or competing lines shall, when demanded by the party complainant, be decided by a jury as in other civil issues;" and also because it is a violation of sec. 3 of the act of March 3, 1881, c. 94 of the Laws of Minnesota for 1881, General Laws, 109, which enacts that "no railroad corporation shall consolidate with, lease or purchase, or in any way become owner of, or control any other railroad corporation, or any stock, franchise, or rights of property thereof, which owns or controls a parallel or competing line."

Defendant answered that it had ample power to make and perform its agreement under its charter; that the true construction of the provisions of the acts of 1874 and 1881, just cited, is that they do not amend or affect its charter, and that if the opposite construction be adopted, they are void in so far as they prohibit or affect its rights to make and perform this agreement, because they are in violation of the contract clause of the Constitution.

Upon the other hand, plaintiff insisted that the right to so amend the charter of the defendant, as to prohibit the performance of this contract, was reserved to the State by sec. 17 of the act of 1856, providing that the act might be amended by any subsequent legislation, in any manner not destroying or impairing the vested rights of said corporation.

The case was first submitted to the court upon motion for injunction, which was denied, and again upon a final hearing upon bill and answer; and the court, for the reasons stated in the opinion upon the motion for injunction, entered a decree dismissing the bill. Whereupon the plaintiff appealed to this court.

Henry J. Horn for appellant.

H. W. Childs, Attorney-General of the State of Minnesota, for that State.

M. D. Grover, *Cushman K. Davis*, *F. B. Kellogg*, and *C. A. Severance* for appellee.

BROWN, J., after stating the case, delivered the opinion of the court.

This case turns upon the question whether the right given by its charter to the Minneapolis & St. Cloud Railroad Co. to connect with any railroad running in the same general direction, and, by a subsequent amendatory act, to consolidate its capital stock, or its property, road, or franchise with those of any other railroad, could be taken away by a subsequent act inhibiting the consolidation, lease or purchase by any railroad of the stock, property or franchise of any parallel or competing line. A different question would have been presented if any such contract had been made and carried into effect before the act of 1874 was passed,

since it might be claimed that the rights of the parties had become vested, within the meaning of sec. 17 of the original charter of the Minnesota & St. Cloud Railroad, and as such could not be destroyed or impaired by subsequent legislation, without infringing upon that provision of the Constitution inhibiting State legislation impairing the obligation of contracts. The case then involves indirectly the meaning of the words "vested rights," when used in the charter of railroads and other similar corporations.

1. The whole doctrine of vested rights as applied to the charters of corporations is based upon the Dartmouth College case, 4 Wheat. 518, in which the broad proposition was laid down that such charters were contracts within the meaning of the Constitution, and hence that an act of the State legislature altering a charter in any material respect was unconstitutional and void. The doctrine of this case has been subjected to more or less criticism by the courts and the profession, but has been reaffirmed and applied so often as to have become firmly established as a canon of American jurisprudence.¹

Subsequent cases have settled the law that wherever property rights have been acquired by virtue of a corporate charter, such rights, so far as they are necessary to the full and complete enjoyment of the main object of the grant, are contracts, and beyond the reach of destructive legislation. Even before the Dartmouth College case was decided, it was held by this court that grants of land made by the Crown to colonial churches were irrevocable, and that property purchased by, or devised to them, prior to the adoption of the Constitution, could not be diverted to other purposes by the States which succeeded to the sovereign power of the colonies. *Terrett v. Taylor*, 9 Cranch, 43; *Town of Pawlet v. Clark*, 9 Cranch, 292; *Society for Propagation of the Gospel v. New Haven*, 8 Wheat. 464.

Indeed, the sanctity of charters vesting in grantees the title to lands or other property has been vindicated in a large number of cases. *Davis v. Gray*, 16 Wall. 203; *Fletcher v. Peck*, 6 Cranch, 87, 137; *Moore v. Robbins*, 96 U. S. 530; *United States v. Schurz*, 102 U. S. 378; *Noble v. Union River Logging Railroad*, 147 U. S. 165.

This court has had, perhaps, more frequent occasion to assert the inviolability of corporate charters in cases respecting the power of taxation than in any other, and in a long series of decisions has held that a clause imposing certain taxes in lieu of all other taxes, or of all taxes to which the company or stockholders therein would be subject, is impaired by legislation raising

¹A portion of the opinion containing a statement of the Dartmouth College case has been omitted.—Ed.

the rate of taxation, or imposing taxes other than those specified in the charter. Thus in *State Bank of Ohio v. Knoop*, 16 How. 369, it was held that where, by a general banking law, it was provided that a certain percentage of dividends should be set off for the use of the State, and should be in lieu of all taxes to which the company or stockholders therein would otherwise be subjected, this was a contract fixing permanently the amount of taxation, and that legislation could not thereafter increase it. In this connection it was said by McLean, J.: "Every valuable privilege given by the charter, and which conduced to an acceptance of it and an organization under it, is a contract which cannot be changed by the legislature where the power to do so is not reserved in the charter. The rate of discount, the duration of the charter, the specific tax agreed to be paid, and other provisions essentially connected with the franchise, and necessary to the business of the bank, cannot, without its consent, become a subject for legislative action." To the same effect are *New Jersey v. Wilson*, 7 Cranch, 164; *Gordon v. Appeal Tax Court*, 3 How. 133; *Dodge v. Woolsey*, 18 How. 331; *Jefferson Branch Bank v. Skelly*, 1 Black, 436; *McGee v. Mathis*, 4 Wall. 143; *Home of the Friendless v. Rouse*, 8 Wall. 430; *Wilmington Railroad v. Reid*, 13 Wall. 264; *Humphrey v. Pegues*, 16 Wall. 244; *Farrington v. Tennessee*, 95 U. S. 679; *New Jersey v. Yard*, 95 U. S. 104; *Asylum v. New Orleans*, 105 U. S. 362. If, however, the charter contain a reservation of an unlimited power to alter, amend, or repeal, the legislature may take away an immunity from taxation. *Tomlinson v. Jessup*, 15 Wall. 454.

Within the same principle are grants of an exclusive right to supply gas or water to a municipality, or to occupy its streets for railway purposes. *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650; *New Orleans Water Works v. Rivers*, 115 U. S. 674; *Louisville Gas Co. v. Citizens' Gas Co.*, 115 U. S. 683; *St. Tammany Water Works v. New Orleans Water Works*, 120 U. S. 64; *Boston & Lowell Railroad v. Salem & Lowell Railroad*, 2 Gray, 1.

So, if a company be chartered with power to construct and maintain a turnpike, erect toll-gates, and collect tolls, such franchise is protected by the Constitution. *Turnpike Co. v. Illinois*, 96 U. S. 63; *Monongahela Navigation Co. v. United States*, 148 U. S. 312.

If it be provided in the charter of a bank that the bills and notes of the institution shall be received in payment of taxes or of debts due to the State, such undertaking on the part of the State constitutes a contract between the State and holders of the notes, which the State is not at liberty to break, although notes issued

after the repeal of the act are not within the contract, and may be refused. *Woodruff v. Trapnall*, 10 How. 190; *Paup v. Drew*, 10 How. 218; *Furman v. Nichol*, 8 Wall. 44; *Keith v. Clark*, 97 U.S. 454; *Antoni v. Greenhow*, 107 U.S. 769; *Poindexter v. Greenhow*, 114 U. S. 270. And in *Planters' Bank v. Sharp*, 6 How. 301, where a bank was chartered with the usual powers to receive money on deposit, discount bills of exchange and notes, and to make loans, and in the course of its business the bank discounted and held promissory notes, and the legislature then passed a law declaring that it should not be lawful for any bank to transfer, by indorsement or otherwise, any note, bill receivable or other evidence of debt, it was held that the statute conflicted with the Constitution and was void. It was said in this case that "a power to dispose of its notes, as well as other property, may well be regarded as an incident to its business as a bank to discount notes, which are required to be in their terms assignable, as well as an incident to its right of holding them and other property, when no express limitation is imposed upon the power to transfer them."

In each of the above cases, however, the title to property had either become vested in the grantee by operation of law, or the exercise of the power granted was so far necessary to the full enjoyment of the main object of the charter, that persons subscribing to the stock might be presumed to take into consideration and be influenced in their subscriptions by the fact that the corporation was endowed with those privileges during the continuance of the charter.

2. Such limitations, however, upon the power of the legislature must be construed in subservience to the general rule that grants by the State are to be construed strictly against the grantees, and that nothing will be presumed to pass except it be expressed in clear and unambiguous language. As was said by Swayne, J., in *Fertilizing Co. v. Hyde Park*, 97 U. S. 659, 666: "The rule of construction in this class of cases is that it shall be most strongly against the corporation. Every reasonable doubt is to be resolved adversely. Nothing is to be taken as conceded but what is given in unmistakable terms, or by an implication equally clear. The affirmative must be shown. Silence is negation, and doubt is fatal to the claim. This doctrine is vital to the public welfare. It is axiomatic in the jurisprudence of this court."

Hence, an exclusive right to enjoy a certain franchise is never presumed, and unless the charter contain words of exclusion, it is no impairment of the grant to permit another to do the same thing, although the value of the franchise to the first grantee may be wholly destroyed. This principle was laid down at an early

day in the case of the Charles River Bridge *v.* Warren Bridge, 11 Pet. 420, and has been steadily adhered to ever since. Turnpike Co. *v.* The State, 3 Wall. 210; Providence Bank *v.* Billings, 4 Pet. 514; Pennsylvania Railroad *v.* Miller, 132 U. S. 75. If, however, there be an exclusive provision—as, for instance, in the charter of a bridge company—that it shall not be lawful for any person to erect another bridge within a certain distance of the bridge authorized, this constitutes an inviolable contract. The Binghamton Bridge, 3 Wall. 51. But even in such cases, if the second charter be for a similar franchise, but to be exercised in a substantially different manner, the exclusive right conferred by the first charter is held not to be violated; as, for instance, if the first charter be for an ordinary bridge, and the second for a railway viaduct, impossible for man or beast to cross, except in railway cars. Bridge Proprietors *v.* Hoboken Co., 1 Wall. 116. So, if the first franchise be for the sole privilege of supplying a city with water from a designated source, it is not impaired by a grant to another party of the privilege to supply it with water from a different source. Stein *v.* Bienville Water Supply Co., 141 U. S. 67.

Upon a similar principle it was held in Tucker *v.* Ferguson, 22 Wall. 527, that a tax upon lands owned by a railway company and not used, nor necessary, in working the road and in the exercise of its franchise, was not unlawful, though the charter had provided for a certain tax upon the railroad company, and had enacted that such tax should be in lieu of all other taxes to be imposed within the State. See also West Wisconsin Railway *v.* Supervisors, 93 U. S. 595.

Nor does it follow, from the fact that the contract evidenced by the charter cannot be impaired, that the power of the legislature over such charter is wholly taken away, since statutes which operate only to regulate the manner in which the franchises are to be exercised, and which do not interfere substantially with the enjoyment of the main object of the grant, are not open to the objection of impairing the contract.

A familiar instance of this class of legislation is that enacted under what is known as the police power. In virtue of this the State may prescribe regulations contributing to the comfort, safety, and health of passengers, the protection of the public at highway crossings or elsewhere, the security of owners of adjacent property, by requiring the track to be fenced and such appliances to be annexed to the engines as shall prevent the communication of fire to neighboring buildings. Cooley Prin. Const. Law, 321. This power, as was said by Miller, J., in the Slaughterhouse Cases, 16 Wall. 36, 62, is and must be, from its very nature,

incapable of any very exact definition or limitation. "Upon it depends the security of social order, the life and health of the citizen, the comfort of existence in a thickly populated community, the enjoyment of private and social life, and the beneficial use of property." The following cases show to what extent and for what purposes this power may be exercised: *Slaughter-house Cases*, 16 Wall. 36; *Fertilizing Co. v. Hyde Park*, 97 U. S. 659; *Beer Co. v. Massachusetts*, 97 U. S. 25; *Patterson v. Kentucky*, 97 U. S. 501; *Barbier v. Connolly*, 113 U. S. 27; *Charlotte, Columbia, etc., Railroad v. Gibbes*, 142 U. S. 386; *Lawton v. Steele*, 152 U. S. 133; *Eagle Insurance Co. v. Ohio*, 153 U. S. 446. And so important is this power and so necessary to the public safety and health, that it cannot be bargained away by the legislature, and hence it has been held that charters for purposes inconsistent with a due regard for the public health or public morals may be abrogated in the interests of a more enlightened public opinion. *Stone v. Mississippi*, 101 U. S. 814; *Phalen v. Virginia*, 8 How. 163, 168.

In obedience to the same principle it has always been held that the legislature may repeal laws authorizing municipal subscriptions to railways, though such laws were in existence at the time the railway was chartered, and may be supposed to have influenced the promoters and stockholders of the road in undertaking its construction. And even if there has been a public vote in favor of such subscription, such vote does not itself form a contract with the railway company protected by the Constitution, the court holding that until the subscription is actually made the contract is unexecuted. *Aspinwall v. Daviess County*, 22 How. 364; *Wadsworth v. Supervisors*, 102 U. S. 534; *Norton v. Brownsville*, 129 U. S. 479; *Concord v. Portsmouth Savings Bank*, 92 U. S. 625; *Falconer v. Buffalo & Jamestown Railroad*, 69 N. Y. 491; *Covington & Lexington Railroad v. Kenton County Court*, 12 B. Mon. 144; *Wilson v. Polk County*, 112 Missouri, 126.

The contract protected by this clause must also be founded upon a good consideration. If it be a mere nude pact, a bare promise to allow a certain thing to be done, it will be construed as a revocable license. Thus, in *Christ Church v. Philadelphia County*, 24 How. 300, the legislature of Pennsylvania enacted that the property of Christ Church Hospital, so long as the same should continue to belong to the same hospital, should be and remain free from taxation. In 1851 they enacted that all property then exempted from taxation, other than that which was in the actual use and occupation of such association, should thereafter be subject to taxation. It was held that the original concession of the legislature exempting the property from taxation

was spontaneous, and no service or duty or other remunerative consideration was imposed upon the corporation, and hence that it was in the nature of a privilege or license, which might be revoked at the pleasure of the sovereign.

In *Turnpike Co. v. Illinois*, 96 U. S. 63, the original charter of the company gave it the right, in consideration of building a turnpike, to erect toll-gates and exact toll for twenty-five years from the date of the charter. In 1861, when the term of charter had more than half expired, the State gave the company a new and additional privilege of using a certain bridge and dike and of erecting a toll-gate thereon. The only consideration required was that the company should keep them in repair. No term was expressed for the enjoyment of the privileges, and no conditions were imposed for resuming or revoking it on the part of the State. It was held that it could not be presumed to have been intended as a perpetual grant, since the company itself had but a limited period of existence, and that a law resuming possession of the bridge and dike by subjecting them to the control and management of the city of East St. Louis was not a law impairing the obligation of the contract.

In *Philadelphia & Gray's Ferry Co.'s Appeal*, 102 Penn. St. 123, it was also held that a supplement to a charter which merely conferred upon the corporation a new right (as an exclusive right to use and occupy certain streets) or enlarged an old one, without imposing any additional burden upon it, was a mere license or promise by the State, and might be revoked at pleasure. "It is without consideration to support it and cannot bind a subsequent legislature."

We have epitomized these cases, not because they have any decisive bearing upon the question at issue, but for the purpose of showing the general trend of opinion in this court upon the subject of corporate charters and vested rights.

3. Conceding that there are no authorities directly in point (and the diligence of counsel has failed to cite us to any), let us see how far these principles are applicable to the case under consideration.

The Great Northern Railway was originally chartered in 1856, under the name of the Minneapolis & St. Cloud Railroad Co., with authority to build a road from Minneapolis, in a northerly direction, to St. Cloud on the Mississippi River, a distance of about seventy-five miles, with an additional line to a point at or near the mouth of the St. Louis River (now Duluth) on Lake Superior, about one hundred and eighty miles, and with a right to connect its road by branches with the road of any railroad company in the Territory, to become the part owner or lessee of any

such railroad and to connect its road with the road of such company, and also to connect with any railroad running in the same direction. This power evidently refers to traffic connections at the termini of the road with other roads running in the same direction, in such manner as to make a continuous line, of which the road in question was to become a part. At this time railway construction west of the Mississippi River was in its infancy; no road existed within two hundred miles of St. Paul; the State was largely a wilderness, and the object of the charter was evidently to connect two cities upon the Mississippi River, one of which was situated some distance above the head of navigation, and also to connect the Mississippi with a port upon Lake Superior, with the possibility that other roads might be constructed further up the river, or in an easterly or westerly direction into the interior. The road was a local one, and while power was given to make traffic connections with other roads, none such was given to consolidate with them—much less with roads having a parallel line. Nor is the act claimed as authorizing the proposed contract.

To save any possible doubt as to the scope of the charter the act was declared by sec. 17 "to be a public act, and may be amended by any subsequent legislative assembly, in any manner not destroying or impairing the vested rights of said corporation."

Nothing appears to have been done under this charter prior to 1865, when it was amended by re-enacting its first section, thereby legalizing and confirming the original organization of the road, and amending sec. 12 so far as to authorize the corporation "to connect with, or adopt as its own . . . any other railroad running in the same general direction with either of its main lines or any branch roads which said corporation is authorized to construct." Another section (8) was added, authorizing the company "to consolidate the whole or any portion of its capital stock with the capital stock or any portion thereof of the road or branch road of any other railroad corporation or company having the same general direction or location, or to become merged therein by way of substitution," etc. And further, by sec. 9, "to consolidate any portion of its road and property, and each branch being organized as aforesaid, may consolidate any portion of its branch road or property with the franchise of any other railroad company or any portion thereof," as might be agreed. And still further, sec. 12, "to consolidate the whole or any portion of its main line or branch railroads, and all the property, rights, powers, franchises, grants, and effects pertaining to such roads, with the rights, powers, franchises, grants, and effects of any other railroad company, either within or without the State," etc., as might be agreed. It will be observed that the

words in original sec. 12 as amended, and in sec. 8, limiting the power to connect with or consolidate with other roads to those having "the same general direction or location," are omitted in secs. 9 and 12.

Under these very broad and practically unlimited powers, the company, which in 1889 took the name of the Great Northern, proceeded, by a series of consolidations, purchases, and leases, to extend its line to the Pacific Ocean, and absorb to itself and operate as a combined system an aggregate length of 4500 miles. It is now proposed, by an arrangement with the bondholders and contemplated purchasers of the Northern Pacific Railway Co., that the Great Northern Railway, the defendant, shall guarantee, for the benefit of the holders of the bonds to be issued by the reorganized company, the payment of the principal and interest upon such bonds, and as a consideration for such guaranty, and as a compensation for the risk to the stockholders, the reorganized company shall transfer to the shareholders of the defendant company, or to a trustee for their use, one-half of the capital stock of the reorganized company. By a further provision, the Northern Pacific is to join with the defendant in providing facilities for an interchange of cars and traffic between their respective lines, and shall interchange traffic with the defendant, and operate its trains to that end upon reasonable, fair, and lawful terms under joint tariffs or otherwise, the defendant having the right to bill its traffic, passengers, and freight from points on its own line to points on the Northern Pacific not reached by the Great Northern, with the further right to make use of the terminal facilities of the Northern Pacific at points where such facilities would be found to be convenient and economical, jointly with that company.

As the Northern Pacific road also controls, by its own construction and by the purchase of stock, other roads extending from the Mississippi River to the Pacific Ocean, and operates as a single system an aggregate mileage of 4500 miles, most of which is parallel to the Great Northern system, the effect of this arrangement would be to practically consolidate the two systems, to operate 9000 miles of railway under a single management, and to destroy any possible advantages the public might have through a competition between the two lines.

It is true that upon its face the agreement contemplates principally an interchange of traffic between the lines under joint tariffs (by which is probably meant similar rates to be agreed upon between the parties), in order that the defendant may enjoy the right to ticket its passengers and consign its freight to points upon the line of the Northern Pacific not reached by the Great

Northern, and to that end is also to have the right to make use of the terminal facilities of the Northern Pacific at such points on the line as should be convenient to the defendant. If the sole object of this agreement were to facilitate an interchange of traffic, so that each road might enjoy the benefit of billing its passengers and freight to points on the other road not reached by it, it would be difficult to foresee any objection to it. But the fact that one-half of the capital stock of the reorganized company is to be turned over to the shareholders of the Great Northern, which is, in turn, to guarantee the payment of the reorganized bonds, is evidence of the most cogent character to show that nothing less than a purchase of a controlling interest, and practically the absolute control, of the Northern Pacific is contemplated by the arrangement. With half of its capital stock already in its hands, the purchase of enough to make a majority would follow almost as a matter of course, and the mastership of the Northern Pacific would be assured.

That the transfer of stock is to be made, not directly to the company, but to the shareholders, is immaterial, since it may be assumed that they would cast their votes in the interest of the company. Either the stock so transferred becomes virtually the property of the Great Northern, or there is no consideration for its guaranty of the principal and interest of the consolidated bonds. But as, by the agreement, the guaranty by the defendant of the Northern Pacific bonds is assumed to be in consideration of a transfer to its stockholders of one-half the capital stock of the reorganized company, it would inevitably follow that this stock would be held for the benefit of the company. There is, however, in addition to that, an alternative provision that the transfer may be made to a trustee for the use of the stockholders, who would of course act as their agent and represent them as a body, and, in fact, stand as the company under another name. Doubtless these stockholders could lawfully acquire by individual purchases a majority, or even the whole of the stock of the reorganized company, and thus possibly obtain its ultimate control; but the companies would still remain separate corporations with no interests, as such, in common. This, though possible, would not be altogether feasible, and would require considerable time for its accomplishment. In a few years the two companies might by sales of the stock, so acquired, become completely dissevered, and the interests of the stockholders of each company thus become antagonistic. Under the proposed arrangement, however, the Northern Pacific as a company, in return for a guaranty, which the individual stockholders could not give, turns over to a trustee for the entire body of stockholders of the Great Northern

one-half of its stock, with the almost certainty of the latter securing the complete control, and probably the ultimate amalgamation, of the two companies. If such amalgamation were once effected it would in all probability be final. We think the proposed arrangement is a plain violation of the acts of the State legislature passed in 1874 and 1881, prohibiting railroad corporations from consolidating with, leasing or purchasing, or in any other way becoming the owner of or controlling any other railroad corporation, or the stock, franchises, or rights of property thereof, having a parallel or competing line.

Under the broad powers conferred by the amended act of 1865, it is probable that this arrangement might be lawfully made; and the question is whether an unexecuted power to make such arrangement is a "vested right" within the meaning of sec. 17 of the original act. It is possible that if this arrangement had been actually made and carried into effect before the acts forbidding the consolidation of parallel or competing lines had been passed, the rights of the parties thereto would have become vested, and could not be impaired by any subsequent act of the legislature. But the real question before us is whether a bare unexecuted power to consolidate with other corporations, a power which, if it exists as claimed by the defendant, would authorize it to absorb by successive and gradual accretions the entire railway system of the country, is not, so long as it remains unexecuted, within the control of and subject to revocation by the legislature, at least, so far as it applies to parallel or competing lines.

A vested right is defined by Fearn, in his work upon Contingent Remainders, as "an immediate fixed right of present or future enjoyment;" and by Chancellor Kent as "an immediate right of present enjoyment, or a present fixed right of future enjoyment." 4 Kent Com. 202. It is said by Cooley, J., that "rights are vested, in contradistinction to being expectant or contingent. They are vested, when the right to enjoyment, present or prospective, has become the property of some particular person or persons as a present interest. They are expectant, when they depend upon the continued existence of the present condition of things until the happening of some future event. They are contingent, when they are only to come into existence on an event or condition which may not happen or be performed until some other event may prevent their vesting." Principles of Const. Law, 332.

As applied to railroad corporations, it may reasonably be contended that the term extends to all rights of property acquired by executed contracts, as well as to all such rights as are necessary to the full and complete enjoyment of the original grant, or of property legally acquired subsequent to such grant. If, for

example, the legislature should authorize the construction of a certain railroad, and by a subsequent act should take away the power to raise funds for the construction of the road in the usual manner by a mortgage, or the power to purchase rolling stock or equipment, such acts might perhaps be treated as so far destructive of the original grant as to render it valueless, although there might in neither case be an express repeal of any of its provisions. *Sala v. New Orleans*, 2 Woods, 188.

But where the charter authorizes the company in sweeping terms to do certain things which are unnecessary to the main object of the grant, and not directly and immediately within the contemplation of the parties thereto, the power so conferred, so long as it is unexecuted, is within the control of the legislature and may be treated as a license, and may be revoked, if a possible exercise of such power is found to conflict with the interests of the public. As applicable to the case under consideration, we think it was competent for the legislature to declare that the power it had conferred upon the Minneapolis & St. Cloud Railway Co. to consolidate its interest with those of other similar corporations should not be exercised, so far as applicable to parallel and competing lines, inasmuch as it is for the interest of the public that there should be competition between parallel roads. The legislature has the right to assume in this connection that neither road would reduce its tariff to a destructive or unprofitable figure, or to a point where either road would become valueless to its stockholders, and that the object of the act in question is to prevent such a combination between the two as would constitute a monopoly.

When the act of 1865 was passed it was doubtless contemplated that the Minneapolis & St. Cloud Railway Co. would desire to extend its road (though it is hardly possible to suppose that an extension to the Pacific coast was thought of at that time), and to build, purchase, or lease branch roads, which would serve as feeders to its main line, and open up railway communication with territory naturally tributary to St. Paul and other towns on the Mississippi River. Such anticipations were perfectly legitimate, and these broad powers were undoubtedly intended as an encouragement to the construction of railways, to the development of the vast, unoccupied, but fertile, territory stretching in both directions from the course of the Mississippi River, and also to a connection with the fertile wheat-growing section of Manitoba, by a branch road to the Canadian line. Had it occurred to the legislature at that time that these almost unlimited powers would be used to obtain the control of parallel and competing lines, and to stifle legitimate competition, doubtless a proviso

would have been inserted to meet this possibility. That the charter of 1865 might be made available to accomplish this purpose became apparent so soon, that, within nine years thereafter, and before the construction of the road had been fairly entered upon, the legislature declared, in its act of March 9, 1874, that no railroad corporation should consolidate with, lease, purchase, or control any parallel or competing line; and to indicate still more clearly that its object was only to prevent the abuse of these powers by the creation of a monopoly, it passed another act, in 1881, repeating this prohibition, and further declaring that any railroad corporation, whether organized under general law or special charter, might consolidate with, lease, purchase, or in any way become the owner of, or control, or hold the stock of any other railroad corporation, when the respective roads could be lawfully connected and operated together, so as to constitute one continuous main line, with or without branches.

We do not deem it necessary to express an opinion in this case whether the legislature could wholly revoke the power it had given to this company to extend its system by the construction or purchase of branch lines or feeders; since the possibility of an extension of the road, even to the Pacific coast, may have had an influence upon persons contemplating the purchase of its stock or securities, so that a right to do this might be said to have become vested. But we think it was competent for the legislature, out of due regard for the public welfare, to declare that its charter should not be used for the purpose of stifling competition and building up monopolies. In short, we cannot recognize a vested right to do a manifest wrong.

Nor do we undertake to say that the legislature may not, in the exercise of a wise foresight, and for the purpose of attracting capital to enterprises of doubtful profit, authorize the granting of monopolies for a limited time, irrevocable by a subsequent legislature. To do so would practically ignore or overrule a series of cases to which we have already adverted, wherein corporations have been induced to furnish municipalities with bridges, gas, water, and other requirements of modern civilization, by the promise of exclusive privileges for a term of years. Perhaps, too, it might not be beyond the competency of the legislature to authorize a railroad, by a clear and explicit act, to consolidate with a parallel or competing line, since cases may be imagined where it might be for the public welfare to permit such consolidation. But the act of 1865, upon which the defendant relies, contains no such provision. There is only a general authority to consolidate, which we think the legislature may, by another act, declare shall not apply to cases manifestly not within its original intent. We

think the general doctrine, requiring grants to corporations to be construed favorably to the public where there is a reasonable doubt as to the extent of the privilege conferred, may properly be invoked to declare that such privileges shall not be used to the detriment of the public.

Whether the consolidation of competing lines will necessarily result in an increase of rates, or whether such consolidation has generally resulted in a detriment to the public, is beside the question. Whether it has that effect or not, it certainly puts it in the power of the consolidated corporation to give it that effect—in short, puts the public at the mercy of the corporation. There is and has been, for the past three hundred years, both in England and in this country, a popular prejudice against monopolies in general, which has found expression in innumerable acts of legislation. We cannot say that such prejudice is not well founded. It is a matter upon which the legislature is entitled to pass judgment. At least there is sufficient doubt of the propriety of such monopolies to authorize the legislature, which may be presumed to represent the views of the public, to say that it will not tolerate them unless the power to establish them be conferred by clear and explicit language. While, in particular cases, two railways by consolidating their interests under a single management may have been able to so far reduce the expenses of administration as to give their customers the benefit of a lower tariff, the logical effect of all monopolies is an increase of price of the thing produced, whether it be merchandise or transportation. Owing to the greater speed and cheapness of the service performed by them, railways become necessarily monopolists of all traffic along their lines; but the general sentiment of the public declares that such monopolies must be limited to the necessities of the case, and rebels against the attempt of one road to control all traffic between terminal points, also connected by a competing line. There are, moreover, thought to be other dangers to the moral sense of the community incident to such great aggregations of wealth, which, though indirect, are even more insidious in their influence, and such as have awakened feelings of hostility which have not failed to find expression in legislative acts.

The consolidation of these two great corporations will unavoidably result in giving to the defendant a monopoly of all traffic in the northern half of the State of Minnesota, as well as of all trans-continental traffic north of the line of the Union Pacific, against which public regulations will be but a feeble protection. The acts of the Minnesota legislature of 1874 and 1881 undoubtedly reflected the general sentiment of the public, that their best security is in competition.

In conclusion, we hold that where, by a railway charter, a general power is given to consolidate with, purchase, lease, or acquire the stock of other roads, which has remained unexecuted, it is within the competency of the legislature to declare, by subsequent acts, that this power shall not extend to the purchase, lease, or consolidation with parallel or competing lines.

The decree of the court below must therefore be reversed, and the case remanded for further proceedings in conformity with this opinion.

Field and Brewer, JJ., dissented.

LOUISVILLE & NASHVILLE RAILROAD CO. *v.*
KENTUCKY.

IN THE SUPREME COURT OF THE UNITED STATES, MARCH 30, 1896.

[*Reported in 161 United States Reports 677.*]

THIS was a bill in equity, styled a petition, originally filed by the Commonwealth of Kentucky against the Louisville & Nashville Railroad Co. (hereinafter called the L. & N. Co.), the Chesapeake, Ohio & Southwestern Railroad Co. (hereinafter called the Chesapeake Co.) and several subordinate corporations tributary to the latter, to enjoin the L. & N. Co. (1) from acquiring the control of, or operating, the parallel and competing lines of railroad known as the Chesapeake, Ohio and Southwestern system; (2) from acquiring or operating the Short Route Railway Transfer Co., a belt line in Louisville, and the Union Depot in Louisville, connected therewith; and also (3) to enjoin the Chesapeake, Ohio and Southwestern system from selling out to or permitting its roads to be operated by its competitor, the L. & N. Co.

It was stated substantially in the Commonwealth's petition, as its cause of action, that the L. & N. Co. owned and controlled many railroads in Kentucky, as respects which, railroads owned or controlled by the other companies named are parallel and competing; that defendants have made a contract and arrangement, whereby the L. & N. Co. is to become the owner and acquire a control of the capital stock, franchises, and property of the other defendant companies, to the great injury of the Commonwealth, and in violation of sec. 201 of the State Constitution of 1891, which reads as follows:

"Sec. 201. No railroad, telegraph, telephone, bridge, or com-

mon carrier company shall consolidate its capital stock, franchises, or property, or pool its earnings, in whole or in part, with any other railroad, telegraph, telephone, bridge, or common carrier company, owning a parallel or competing line or structure; or acquire, by purchase, lease, or otherwise, any parallel or competing line or structure, or operate the same; nor shall any railroad company or other common carrier combine or make any contract with the owners of any vessel that leaves or makes port in this State, or with any common carrier, by which combination or contract the earnings of the one doing the carrying are to be shared by the other not doing the carrying."

In an amended petition it was stated in substance that the L. & N. Co. was endeavoring to acquire the capital stock, interest in real property and mortgage securities of the other defendant companies, in order to obtain control and ultimately purchase at judicial sale and become the owner of their franchises and property.

The answer denied the allegation in the form as made, but contained an affirmative statement that the purchase of the stock and securities referred to had already been consummated, and in effect admitted that the L. & N. Co. intended to purchase the franchises and properties at judicial sale.

The L. & N. Co. was incorporated by an act of the Kentucky legislature, approved March 5, 1850, the fourteenth section of which act provided "that the president and directors of said company are hereby vested with all powers and rights necessary to the construction of a railroad from the city of Louisville to the Tennessee line, in the direction of Nashville, the route, to be by them selected and determined, not exceeding sixty-six feet wide, with as many sets of tracks as they may deem necessary; and that they may cause to be made contracts with others for making said railroad, or any part of it."

This act was frequently amended in details unnecessary to be noticed here, one of which, adopted March 7, 1854, declared (sec. 4) "that it shall be lawful for said Louisville & Nashville Railroad Co. to unite their road with any other road connecting therewith upon such terms and conditions as may be agreed upon between the said Louisville & Nashville Railroad Co. and such other company as they may desire to unite their said road with."

On December, 15, 1855, the legislature of Tennessee passed an act to amend an act entitled "An Act to charter the Louisville & Nashville Railroad Co., and the several acts amending said act passed by the legislatures of Kentucky and Tennessee" (Laws of Kentucky, 1855-6, c. 227), under which it had been authorized to construct its road in Tennessee from the Kentucky line to Nashville, the thirteenth section of which act provided as follows:

"Sec. 13. Be it further enacted, That this act shall take effect from and after its passage: Provided, Nothing herein contained shall be construed to prevent the Louisville & Nashville Railroad Co. from admitting branch roads to connect with it at any point or points to be agreed upon between said company and those who have or may subscribe stock for the construction of any branch road. The stock subscribed, and the means created to construct such separate branch, shall be faithfully applied to that purpose; and said company is hereby vested with the power and the right to issue its bonds under the provisions of this act to obtain means to construct and equip any branch road; the bonds to express on their face the purpose for which they were executed; and to secure their payment may execute a deed of trust, or mortgage, for payment of which the rights, credits, profits, property, and franchise, procured for said branch by the use of its means, shall alone be made liable. The credit, rights, or profits of the main stem shall not be used to create means to construct, or be made liable for any debt or liability created to construct, branch roads; nor shall the rights, credit, property, and profits of any branch road be used to create means to construct, or made liable for any debt or liability created to build the main stem; and with a view to such liabilities and profits, said company shall keep separate accounts, exhibiting the stock, property, and debts of the main road, and each separate branch."

On January 17, 1856, the legislature of Kentucky passed an act, the first section of which re-enacted the act passed by the legislature of Tennessee in 1855 "in the following sections and words:" (Here follows a literal copy of the Tennessee act.) The second section of this act vested the Louisville & Nashville Co. with power to make agreements with any Tennessee corporation to construct a railroad in part or in whole of the distance between Louisville and Memphis, and running in the direction of Louisville, whereby to secure mutual and reciprocal rights to the contracting parties, etc. The third section was as follows: "That the said company may, under the provisions of the thirteenth section of this act" (referring evidently to the thirteenth section of the Tennessee act), "from time to time extend any branch road, and may purchase and hold any road constructed by another company, or may agree on terms to receive the cars of other roads on their said road, but shall charge for the same the usual freight."

At the same session, and on February 14, 1856 (Laws of Kentucky, 1855-6, c. 148), the legislature of Kentucky passed what is known as the General Reservation Act, the language of which, so far as it is material here, is as follows:

"Sec. 1. That all charters and grants of, or to corporations, or

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amendments thereof, and all other statutes shall be subject to amendment or repeal at the will of the legislature, unless a contrary intent be therein plainly expressed: Provided, That whilst privileges and franchises so granted may be changed or repealed, no amendment or repeal shall impair other rights previously vested. . . .

In 1856 passed in and according to an enactment.

"Sec. 3. That the provisions of this act shall only apply to charters and acts of incorporation to be granted hereafter; and that this act shall take effect from its passage."

At this time and up to September, 1856, the L. & N. Co. owned only a short piece of road—thirty-one miles in length—extending from Louisville, southwardly, to Lebanon Junction. Up to September, 1857, it owned only forty-five miles; to September, 1858, seventy-two miles; in 1859, only one hundred and ten miles; and not till 1860 did it carry its road to Nashville, one hundred and eighty miles. About the same time was constructed a branch road from a point about seven miles south of Bowling Green to the State line, which has since been extended and is now owned and operated by it, to Memphis, Tennessee. Subsequently it purchased and now owns a road known as the Evansville, Henderson & Nashville Railroad, which extends from Edgefield, Tennessee, on its main line ten miles north of Nashville, by way of Hopkinsville, Kentucky, to Henderson, and thence across the Ohio River to Evansville, Indiana. It also owns and operates various branches in the State of Kentucky that diverge from the main line eastwardly, as well as the Kentucky Central Railroad, extending from Cincinnati southward, and certain branches thereof.

Of the roads constituting the Chesapeake, Ohio and Southwestern system, the first one extended from Paducah to Elizabethtown, and was subsequently extended from Cecilia Junction, six miles from Elizabethtown, to Louisville, whereby a continuous line was formed from Louisville to Paducah, independent of the L. & N. road. But by a subsequent lease, amounting practically to a purchase of a road from Paducah to Memphis, the Chesapeake Co. became, about 1881, the owner of a connected, continuous, and independent railroad from Louisville by way of Cecilia Junction and Paducah to Memphis. It also has an interest in, and control of, several other railroads bearing the name of, and nominally held by, the companies that built them, one of which is termed the Short Route Railway, extending from Preston street in Louisville through the depot at Seventh and Water streets to Twelfth street, where it connects with the main line.

Upon the hearing of the case upon pleadings and proofs, a decree was entered by the Jefferson Circuit Court in favor of the Commonwealth, enjoining the proposed agreement for consolida-

tion, which decree was subsequently affirmed by the Court of Appeals of Kentucky. 31 S. W. Rep. 476.

Whereupon the L. & N. Co. sued out a writ of error from this court.

Helm Bruce, Edward Baxter, and James P. Helm for plaintiff in error.

George M. Davie and Alexander P. Humphrey for defendant in error.

BROWN, J., after stating the case, delivered the opinion of the court.

This case turns to a certain extent upon the principles just announced in *Pearsall v. Great Northern Railway Co.*, *ante*, 646, although it differs from that case in the fact that the charter of the L. & N. Co. contains no reserved power to alter or amend, as well as in several other minor particulars.

4. Whatever be the disposition of this question, and however broad the powers of the L. & N. Co., under its charter of 1856, we are still confronted with the proposition that the proposed consolidation of these two railway systems is a clear violation of sec. 201 of the Constitution, which forbids the consolidation of the stock, franchises, or property, as well as the purchase and lease of parallel and competing lines.¹ Unless this section impairs the obligation of the contract contained in the charter, it operates as a repeal of any power that may possibly be deduced from such charter to purchase, lease or consolidate with any parallel or competing line. In this particular the case differs from that of *Pearsall v. Great Northern Railway*, just decided, only in the fact that the charter of the Great Northern, while conferring a power to consolidate with other roads in much clearer and more explicit language than was used in the L. & N. charter, also contained in sec. 17 the reservation of a power to amend in any manner not destroying or impairing the vested rights of the corporation. The opinion in that case dealt largely with the question whether a subsequent act of the legislature taking away this power so long as it was unexecuted, and so far as it applied to parallel or competing lines, impaired a vested right. Our conclusion was that it did not.

We regard the issue presented in this case as involving practically the same question. While there is no general reservation clause in the charter of the L. & N. Co., we think, for the reasons stated in the *Pearsall* case, that under its police power the people, in their sovereign capacity, or the legislature, as their representatives, may deal with the charter of a railway corporation, so far as is necessary for the protection of the lives, health, and safety of

¹ Only so much of the opinion is given as relates to this question.—ED.

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its passengers or the public, or for the security of property or the conservation of the public interests, provided, of course, that no vested rights are thereby impaired. In other words, the legislature may not destroy vested rights, whether they are expressly prohibited from doing so or not, but otherwise may legislate with respect to corporations, whether expressly permitted to do so or not. While the police power has been most frequently exercised with respect to matters which concern the public health, safety, or morals, we have frequently held that corporations engaged in a public service are subject to legislative control, so far as it becomes necessary for the protection of the public interests. In the case of *Munn v. Illinois*, 94 U. S. 113, Walte, Ch. J., said: "Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but so long as he maintains the use, he must submit to the control."

There was a difference of opinion in the court as to whether this language applied to elevators in such manner as to empower the legislature to fix their charges; but it has been too often held that railways were public highways, and their functions were those of the State, though their ownership was private, and that they were subject to control for the common good, to be now open to question. It was so expressly stated in *Olcott v. Supervisors*, 16 Wall. 678, 694. This power was held to extend, in *New York v. Miln*, 11 Pet. 102, to a law requiring the masters of emigrant vessels to report an account of their passengers; in the *Railroad Commission cases*, 116 U. S. 307, to the right of a State to reasonably limit the amount of charges by a railway company for the transportation of persons and property within its jurisdiction, notwithstanding a statute which granted to it the right "from time to time to fix, regulate, and receive the tolls and charges by them to be received for transportation;" in *Mugler v. Kansas*, 123 U. S. 623, to legislation which prohibited the manufacture of intoxicating liquors within the limits of the State, even as to persons who, at the time, happened to own property whose chief value consisted in its fitness for such manufacturing purposes; in *Georgia Banking Co. v. Smith*, 128 U. S. 174, to the prevention of extortion by railways, by unreasonable charges, and favoritism by discriminations; in *Charlotte, etc., Railroad v. Gibbes*, 142 U. S. 386, to a requirement that the salaries and expenses of a State

railroad commission be borne by the railroad corporations within the State; in *New York & New England Railroad v. Bristol*, 151 U. S. 556, to a statute compelling the removal of grade crossings; in *Commonwealth v. Alger*, 7 Cushing, 53, to the establishment of harbor lines, beyond which land owners shall not extend their wharves; and in *Eagle Insurance Co. v. Ohio*, 153 U. S. 446, to a requirement that insurance companies make returns to the proper State officers of their business conditions, etc., notwithstanding the company be organized under a special charter, which did not in terms require it to make such return.

Indeed, it was broadly held in *Chicago Life Insurance Co. v. Needles*, 113 U. S. 574, that the grant of a corporate franchise is necessarily subject to the condition that the privileges and franchises conferred shall not be abused, or employed to defeat the ends for which they were conferred; and that, when abused or misemployed, they may be withdrawn by proceedings consistent with law. It was said in this case that an insurance corporation was subject to such reasonable regulations as the legislature might from time to time prescribe, for the general conduct of its affairs, serving only to secure the ends for which it was created, and not materially interfering with the privileges granted to it. "It would be extraordinary," said the court (page 580), "if the legislative department of a government, charged with the duty of enacting such laws as may promote the health, the morals, and the prosperity of the people, might not, when unrestrained by constitutional limitations upon its authority, provide, by reasonable regulations, against the misuse of special corporate privileges which it has granted, and which could not, except by its sanction, express or implied, have been exercised at all." It was further held that the establishment against such a corporation before a judicial tribunal that it was insolvent, or that its condition was such as to render its continuance in business hazardous to the public; or that it had exceeded its corporate powers; or that it had violated the rules, restrictions, or conditions prescribed by law, constituted a sufficient reason for the State, which created it, to reclaim the franchises and privileges granted to it.

We think that the principle of these cases applies to the power of the legislature to forbid the consolidation of parallel or competing lines, whenever, in its opinion, such consolidation is calculated to affect injuriously the public interests. Not only is the purchase of stock in another company beyond the power of a railroad corporation in the absence of an express stipulation in the charter, but the purchase of such stock in a rival and competing line is held to be contrary to public policy and void. *Cook on Stockholders*, § 315; *Central Railroad Co. v. Collins*, 40 Georgia,

582; Hazlehurst v. Savannah, etc., Railroad Co., 43 Georgia, 13; Elkins v. Camden & Atlantic Railroad Co., 36 N. J. Eq. 5. The doctrine is peculiarly applicable to this case, in which it is shown that the Chesapeake Co. was largely aided in its construction by contributions from municipalities along its line for the very purpose of obtaining competition with the L. & N. Co.—a purpose which would, of course, be defeated by a combination with it. This restriction upon the unlimited power to consolidate with other roads is not, as the plaintiff in error suggests, called for by any new view of commercial policy, but in virtue of a settled policy which has obtained in Kentucky since 1858, in Minnesota since 1874, in Ohio since 1851, in New Hampshire since 1867, and by more recent enactments in some dozen other States—a policy which has not only found a place in the statute law of such States as apprehended evil effects from such consolidations, but has been declared by the courts to be necessary to protect the public from the establishment of monopolies. Indeed, the unanimity with which the States have legislated against the consolidation of competing lines shows that it is not the result of a local prejudice, but of a general sentiment that such monopolies are reprehensible. The fact that, in certain cases, the legislature has seen fit to sanction the consolidation of parallel roads does not militate against the general principle that the consolidation of competing lines is contrary to public policy. Parallel lines are not necessarily competing lines, as they not infrequently connect entirely different termini and command the traffic of distinct territories. For instance, a line from Toledo to Cincinnati is substantially parallel with another from Chicago to Cairo, but they could scarcely be called competing, since one is dependent upon the traffic of the Northwest, while Cincinnati is the southern outlet of the traffic of the Northeastern States and the lower lakes. Another familiar instance is that of the three north and south railways through the State of Connecticut, one from Bridgeport to Pittsfield in Massachusetts, another from New Haven to Springfield, and another from Norwich to Worcester. These are strictly parallel lines, but in only a limited sense competing, since they are between different termini, and each is required for the trade of its own section of the State. Even in the present case the competition is mostly confined to the through traffic. Considerations of this kind may induce legislatures, in particular instances, to permit the consolidation of parallel roads without intending thereby to relinquish their right to forbid the consolidation of such parallel lines as are in fact competing.

Permission to consolidate such roads is no more to be taken as an approval of a general policy of consolidation than are the laws

which have been repeatedly upheld by this court, granting corporations exclusive privileges to supply municipalities with the comforts of life for a certain number of years, of which class of monopolies the one upheld in *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650, is a distinguished example. Such cases are, however, exceptional, and rest upon the theory of an authority expressly vested in the corporation for a limited time, in consideration of benefits likely to accrue to the public from the establishment of a particular industry. Even in such cases, however, we have held that the monopoly may be modified or abrogated, if it proved to be prejudicial to the public health or public morals. *Butchers' Union Co. v. Crescent City Co.*, 111 U. S. 746. In this case Miller, J., in delivering the opinion of the court, observed, p. 750: "While we are not prepared to say that the legislature can make valid contracts on no subject embraced in the largest definition of the police power, we think that, in regard to two subjects so embraced, it cannot, by any contract, limit the exercise of such powers to the prejudice of the general welfare. These are the public health and public morals. The preservation of these is so necessary to the best interests of social organization that a wise policy forbids the legislative body to divest itself of the power to enact laws for the preservation of health and the repression of crime." To the same effect are *Boyd v. Alabama*, 94 U. S. 645; *Beer Co. v. Massachusetts*, 97 U. S. 25.

There are doubtless cases where the police power has been invoked to justify acts of the legislature which were dictated, to a certain extent, by local interests, or with the effect of unduly burdening or interfering with foreign or interstate commerce. Within this category are laws levying taxes upon alien passengers arriving from foreign ports, for the use of hospitals—the *Passenger Cases*, 7 How. 283; requiring a bond to be given for every such passenger to indemnify the State against expense for the relief or support of the person named in the bond—*Henderson v. New York*, 92 U. S. 259; even though such bonds be limited to lewd and debauched women—*Chy Lung v. Freeman*, 92 U. S. 275; prohibiting the driving or conveying of foreign cattle into the State between certain dates—*Railroad Co. v. Husen*, 95 U. S. 465; taxing persons from other States engaged in selling or soliciting the sale of liquors, to be shipped into the State from places without it, without imposing a tax upon similar agents for manufacturers within the State—*Walling v. Michigan*, 116 U. S. 446; *Welton v. Missouri*, 91 U. S. 275; statutes requiring inspection, before slaughtering, of cattle, sheep, and swine designed for slaughter for human food, so far as they apply to foreign meats—*Minnesota v. Barber*, 136 U. S. 313; a similar statute prohibiting the sale of

meat from animals slaughtered one hundred miles or more from the place at which it was offered for sale, unless previously inspected by local inspectors—*Brimmer v. Rebman*, 138 U. S. 78; and finally, to statutes requiring a license, under onerous conditions, from the agents of foreign express companies—*Crutcher v. Kentucky*, 141 U. S. 47.

These cases, however, do not infringe upon the general principle, so frequently declared, that where the police power is invoked in good faith for the prohibition of a practice which the legislature has declared to be detrimental to the public interests, it will be sustained, wherever it can be done without the impairment of vested rights. Notwithstanding these cases, the general rule holds good that whatever is contrary to public policy or inimical to the public interests is subject to the police power of the State, and within legislative control, and in the exertion of such power the legislature is vested with a large discretion, which, if exercised *bona fide* for the protection of the public, is beyond the reach of judicial inquiry.

The decree of the Court of Appeals of Kentucky is, therefore, affirmed.

Brewer and White, JJ., concurred in the result.

HENNINGTON v. GEORGIA.

IN THE SUPREME COURT OF THE UNITED STATES, MAY 18, 1896.

[Reported in 163 *United States Reports* 299.]

THE case is stated in the opinion.

Edward Colston for plaintiff in error. *George Hoadley, Jr.*, was on his brief.

J. M. Terrell for defendant in error.

HARLAN, J., delivered the opinion of the court.¹

The plaintiff in error, Hennington, superintendent of transportation, and having charge of the freight business of the Alabama Great Southern Railroad Co., was indicted in the Superior Court of Dade County, Georgia, for the offense of having, on the 15th day of March, 1891—that being the Sabbath day—unlawfully run a freight train on the Alabama Great Southern Railroad in that county.

The defendant pleaded not guilty. He also pleaded specially certain facts which, he averred, showed that the statute of

¹The opinion is not given in full.—Ed.

Georgia, as applied to this case, was in conflict with the provision of the Constitution of the United States giving Congress power to regulate commerce among the States.

At the trial the defendant admitted that he was superintendent of transportation of the Alabama Great Southern Railroad, the property of the Alabama Great Southern Railroad Co., a corporation of Alabama; that the line of that railroad began at the city of Chattanooga, Tennessee, extended nine miles through that State, when it entered the county of Dade, Georgia, and ran through that county and over the line of road constructed and operated originally by the Wills Valley Railroad Co., into Alabama; thence through Alabama two hundred and forty-five miles, and into Mississippi, to the city of Meridian, where it connected with other roads; that said company was acting as a common carrier of passengers and freight along its line, using engines and cars propelled by steam; that on the day mentioned in the indictment the company, by its superintendent of transportation, the defendant, ran over its line of road from Chattanooga, Tennessee, through Georgia and Alabama to Meridian, Mississippi, a train of cars laden with freight for points beyond the limits of Georgia, the train having been loaded in Tennessee with freight destined for points outside and beyond the limits of Georgia.

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The defendant contended that the statute, if applied to these facts, was repugnant to the Constitution of the United States. This contention was overruled and the jury were instructed that, under the facts admitted, the defendant was guilty. The jury accordingly found him guilty as charged in the indictment.

The case was taken to the Supreme Court of Georgia, and it was assigned for error that the trial court refused to adjudge sec. 4578 of the Code of Georgia, when applied to the admitted facts, to be repugnant to the commerce clause of the Constitution.

The Supreme Court of Georgia held the statute, under which the prosecution was instituted, to be a regulation of internal police and not a regulation of commerce; that it was not in conflict with the Constitution of the United States even as to freight trains passing through the State from and to adjacent States, and laden exclusively with freight received on board before the trains entered Georgia and consigned to points beyond its limits.

As the judgment of the Supreme Court of Georgia denied to the defendant a right or immunity specially set up and claimed by him under the Constitution of the United States, no question is or can be made as to the jurisdiction of this court to review that judgment.

D. J. [unclear]

If the statute in question forbidding the running in Georgia of railroad freight trains, on the Sabbath day, had been expressly

limited to trains laden with domestic freight, it could not be regarded otherwise than as an ordinary police regulation established by the State under its general power to protect the health and morals, and to promote the welfare, of its people. . . .

In what light is the statute of Georgia to be regarded? The well-settled rule is, that if a statute purporting to have been enacted to protect the public health, the public morals, or the public safety has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge and thereby give effect to the Constitution. *Mugler v. Kansas*, 123 U. S. 623, 661; *Minnesota v. Barber*, 136 U. S. 313, 350.

In our opinion there is nothing in the legislation in question which suggests that it was enacted with the purpose to regulate interstate commerce, or with any other purpose than to prescribe a rule of civil duty for all who, on the Sabbath day, are within the territorial jurisdiction of the State. It is none the less a civil regulation because the day on which the running of freight trains is prohibited is kept by many under a sense of religious duty. The legislature having, as will not be disputed, power to enact laws to promote the order and to secure the comfort, happiness, and health of the people, it was within its discretion to fix the day when all labor within the limits of the State, works of necessity and charity excepted, should cease. It is not for the judiciary to say that the wrong day was fixed, much less that the legislature erred when it assumed that the best interests of all required that one day in seven should be kept for the purposes of rest from ordinary labor. The fundamental law of the State committed these matters to the determination of the legislature. If the lawmaking power errs in such matters, its responsibility is to the electors, and not to the judicial branch of the Government. The whole theory of our government, Federal and State, is hostile to the idea that questions of legislative authority may depend upon expediency, or upon opinions of judges as to the wisdom or want of wisdom in the enactment of laws under powers clearly conferred upon the legislature. The legislature of Georgia no doubt acted upon the view that the keeping of one day in seven for rest and relaxation was "of admirable service to a State considered merely as a civil institution." 4 Bl. Com. *63. . . .

Assuming, then, that both upon principle and authority the statute of Georgia is, in every substantial sense, a police regulation established under the general authority possessed by the legislature to provide, by laws, for the well-being of the people, we proceed to consider whether it is in conflict with the Constitution of the United States.

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The defendant contends that the running on the Sabbath day of railroad cars, laden with interstate freight, is committed exclusively to the control and supervision of the National Government; and that, although Congress has not taken any affirmative action upon the subject, State legislation interrupting, even for a limited time only, interstate commerce, whatever may be its object and however essential such legislation may be for the comfort, peace, and safety of the people of the State, is a regulation of interstate commerce forbidden by the Constitution of the United States. Is this view of the Constitution and of the relations between the States and the general Government sustained by the former decisions of this court? Is the admitted general power of a State to provide by legislation for the health, the morals, and the general welfare of its people so fettered that it may not enact any law whatever that relates to or affects in any degree the conduct of commerce among the States? If the people of a State deem it necessary to their peace, comfort, and happiness, to say nothing of the public health and the public morals, that one day in each week be set apart by law as a day when business of all kinds carried on within the limits of that State shall cease, whereby all persons of every race and condition in life may have an opportunity to enjoy absolute rest and quiet, is that result, so far as interstate freight traffic is concerned, attainable only through an affirmative act of Congress giving its assent to such legislation?

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The argument in behalf of the defendants rests upon the erroneous assumption that the statute of Georgia is such a regulation of interstate commerce as is forbidden by the Constitution, without reference to affirmative action by Congress, and not merely a statute enacted by the State under its police power, and which, although in some degree affecting interstate commerce, does not go beyond the necessities of the case, and, therefore, is valid, at least until Congress interferes.

The distinction here suggested is not new in our jurisprudence. It has been often recognized and enforced by this court. . . .

Upon the subject of legislation enacted under the police power of a State, and which, although affecting more or less commerce among the States, was adjudged to be valid; until displaced by some act of Congress, the case of *Smith v. Alabama*, 124 U. S. 465, 474, 479, 482, is instructive. A statute of Alabama made it unlawful for an engineer on a railroad train in that State to operate an engine upon the main line of the road used for the transportation of passengers or freight, without first undergoing an examination and obtaining a license from a State Board of Examiners. The point was made that the statute, in its appli-

cation to engineers on interstate trains, was a regulation of commerce among the States, and repugnant to the Constitution. This court referred to and reaffirmed the principle announced in *Sherlock v. Alling*, 93 U. S. 99, 102, where it was said: "In conferring upon Congress the regulation of commerce, it was never intended to cut the States off from legislating on all subjects relating to the health, life, and safety of their citizens, though the legislation might indirectly affect the commerce of the country. Legislation, in a variety of ways, may affect commerce and persons engaged in it without constituting a regulation of it within the meaning of the Constitution." Referring to the fact that Congress had prescribed the qualifications for pilots and engineers of steam vessels engaged in the coasting trade and navigating the inland waters of the United States, while engaged in commerce among the States, the court, in *Smith v. Alabama*, said that the power of Congress "might, with equal authority, be exercised in prescribing the qualifications for locomotive engineers employed by railroad companies engaged in the transportation of passengers and goods among the States, and in that case would supersede any conflicting provisions on the same subject made by local authority. But the provisions on the subject contained in the statute of Alabama under consideration are not regulations of interstate commerce. It is a misnomer to call them such. Considered in themselves they are parts of that body of the local laws which, as we have already seen, properly governs the relation between carriers of passengers and merchandise and the public who employ them, which are not displaced until they come in conflict with express enactments of Congress in the exercise of its power over commerce, and which, until so displaced, according to the evident intention of Congress, remain as the law governing carriers in the discharge of their obligations, whether engaged in the purely internal commerce of the State or in commerce among the States. No objection to the statute, as an impediment on the free transaction of commerce among the States, can be found in any of its special provisions." Again: "We find, therefore, first, that the statute of Alabama, the validity of which is under consideration, is not, considered in its own nature, a regulation of interstate commerce, even when applied as in the case under consideration; secondly, that it is properly an act of legislation within the scope of the admitted power reserved to the State to regulate the relative rights and duties of persons being and acting within its territorial jurisdiction, intended to operate so as to secure for the public safety of persons and property; and, thirdly, that, so far as it affects transactions of commerce among the States, it does so indi-

rectly, incidentally and remotely, and not so as to burden or impede them, and, in the particulars in which it touches those transactions at all, it is not in conflict with any express enactment of Congress on the subject, nor contrary to any intention of Congress to be presumed from its silence." . . .

These authorities make it clear that the legislative enactments of the States, passed under their admitted police powers, and having a real relation to the domestic peace, order, health, and safety of their people, but which, by their necessary operation, affect to some extent, or for a limited time, the conduct of commerce among the States, are yet not invalid by force alone of the grant of power to Congress to regulate such commerce; and, if not obnoxious to some other constitutional provision or destructive of some right secured by the fundamental law, are to be respected in the courts of the Union until they are superseded and displaced by some act of Congress passed in execution of the power granted to it by the Constitution. Local laws of the character mentioned have their source in the powers which the States reserved and never surrendered to Congress, of providing for the public health, the public morals, and the public safety, and are not, within the meaning of the Constitution, and considered in their own nature, regulations of interstate commerce simply because, for a limited time or to a limited extent, they cover the field occupied by those engaged in such commerce. The statute of Georgia is not directed against interstate commerce. It establishes a rule of civil conduct applicable alike to all freight trains, domestic as well as interstate. It applies to the transportation of interstate freight the same rule precisely that it applies to the transportation of domestic freight. And it places the business of transporting freight in the same category as all other secular business. It simply declares that, on and during the day fixed by law as a day of rest for all the people within the limits of the State from toil and labor incident to their callings, the transportation of freight shall be suspended.

We are of opinion that such a law, although in a limited degree affecting interstate commerce, is not for that reason a needless intrusion upon the domain of Federal jurisdiction, nor strictly a regulation of interstate commerce, but, considered in its own nature, is an ordinary police regulation designed to secure the well-being and to promote the general welfare of the people within the State by which it was established, and, therefore, not invalid by force alone of the Constitution of the United States.

The judgment is affirmed.

The Chief Justice, with whom concurred White, J., dissenting:

Intercourse and trade between the States by means of railroads passing through several States, is a matter national in its character and admitting of uniform regulation. The power of Congress to regulate it is exclusive, and under the Constitution it is free and untrammelled except as Congress otherwise provides. This statute in requiring the suspension of interstate commerce for one day in the week amounts to a regulation of that commerce, and is invalid because the power of Congress in that regard is exclusive. But it is said that the act is not a regulation of commerce, but a mere regulation of police, and that the so-called police power of a State is plenary. The result, however, is the same. When a power of a State and a power of the general Government come into collision, the former must give way; and as the freedom of interstate commerce is secured by the Constitution, except as Congress shall limit it, the act is void because in violation of that freedom.

Brewer, J., did not hear the argument in this case, and took no part in its decision.

GULF, COLORADO & SANTA FÉ RAILWAY COMPANY v. ELLIS.

IN THE SUPREME COURT OF THE UNITED STATES, JANUARY 18, 1897.

[Reported in 165 United States Reports 150.]

ON April 5, 1889, the legislature of the State of Texas passed this act:

"Sec. 1. Be it enacted by the legislature of the State of Texas, That after the time when this act shall take effect any person in this State having a valid *bona fide* claim for personal services rendered or labor done, or for damages, or for overcharges on freight, or claims for stock killed or injured by the train of any railway company, provided that such claims for stock killed or injured shall be presented to the agent of the company nearest to the point where such stock was killed or injured, against any railway corporation operating a railroad in this State, and the amount of such claim does not exceed \$50, may present the same, verified by his affidavit for payment to such corporation by filing it with any station agent of such corporation in any county where suit may be instituted for the same, and if, at the expiration of thirty days after such presentation, such claim has not been paid or satisfied, he may immediately institute suit thereon in the proper court; and

if he shall finally establish his claim, and obtain judgment for the full amount thereof, as presented for payment to such corporation in such court, or any court to which the suit may have been appealed, he shall be entitled to recover the amount of such claim and all costs of suit, and in addition thereto all reasonable attorney's fees, provided he has an attorney employed in his case, not to exceed \$10, to be assessed and awarded by the court or jury trying the issue." Sayle's Supplement to Texas Civil Statutes, p. 768, Art. 4266a.

On October 9, 1890, defendant in error commenced this action before a justice of the peace, to recover \$50 for a colt killed by the railway company. The complaint alleged presentation and non-payment, as required by the act, and demanded \$10 attorney fee. The company answered admitting everything except the claim for the attorney's fee. The case passed, after judgment in favor of the plaintiff for the amount claimed and an attorney's fee of \$10, through the District Court and the Court of Civil Appeals, to the Supreme Court of the State, by which, on May 10, 1894, the judgment against the company was affirmed. 87 Texas, 19. To reverse such judgment the company sued out this writ of error.

E. D. Kenna and *J. W. Terry* for plaintiff in error.

No appearance for defendant in error.

BREWER, J., after stating the case, delivered the opinion of the court.

The single question in this case is the constitutionality of the act allowing attorney's fees. The contention is that it operates to deprive the railroad companies of property without due process of law, and denies to them the equal protection of the law, in that it singles them out of all citizens and corporations, and requires them to pay in certain cases attorney's fees to the parties successfully suing them, while it gives to them no like or corresponding benefit. Only against railroad companies is such exaction made, and only in certain cases.

We have not been favored with any argument or brief from the defendant in error. Doubtless he believed, and justly, that nothing could be added to the arguments so fully and strongly made in support of the constitutionality of this law in the respective opinions of the two highest courts of the State.

The Supreme Court of the State considered this statute as a whole and held it valid, and as such it is presented to us for consideration. Considered as such, it is simply a statute imposing a penalty upon railroad corporations for a failure to pay certain debts. No individuals are thus punished, and no other corporations. The act singles out a certain class of debtors and

punishes them when for like delinquencies it punishes no others. They are not treated as other debtors, or equally with other debtors. They cannot appeal to the courts as other litigants under like conditions and with like protection. If litigation terminates adversely to them, they are mulcted in the attorney's fees of the successful plaintiff; if it terminates in their favor, they recover no attorney's fees. It is no sufficient answer to say that they are punished only when adjudged to be in the wrong. They do not enter the courts upon equal terms. They must pay attorney's fees if wrong; they do not recover any if right; while their adversaries recover if right and pay nothing if wrong. In the suits, therefore, to which they are parties they are discriminated against, and are not treated as others. They do not stand equal before the law. They do not receive its equal protection. All this is obvious from a mere inspection of the statute.

It is true the amount of the attorney's fee which may be charged is small, but if the State has the power to thus mulct them in a small amount it has equal power to do so in a larger sum. The matter of amount does not determine the question of right, and the party who has a legal right may insist upon it, if only a shilling be involved. As well said by Bradley, J., in *Boyd v. United States*, 116 U. S. 616, 635: "Illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizens and against any stealthy encroachments thereon. Their motto should be *obsta principiis*."

While good faith and a knowledge of existing conditions on the part of a legislature is to be presumed, yet to carry that presumption to the extent of always holding that there must be some undisclosed and unknown reason for subjecting certain individuals or corporations to hostile and discriminating legislation is to make the protecting clauses of the Fourteenth Amendment a mere rope of sand, in no manner restraining State action.

It is well settled that corporations are persons within the provisions of the Fourteenth Amendment of the Constitution of the United States. *Santa Clara County v. Southern Pacific Railroad*, 118 U. S. 394; *Pembina Mining Co. v. Pennsylvania*, 125 U. S. 181, 189; *Missouri Pacific Railway v. Mackey*, 127 U. S. 205; *Minneapolis & St. Louis Railway v. Herrick*, 127 U. S. 210; Min-

neapolis & St. Louis Railway *v.* Beckwith, 129 U. S. 26; Charlotte & Columbia Railroad *v.* Gibbes, 142 U. S. 386; Covington & Lexington Turnpike Co. *v.* Sandford, 164 U. S. 578. The rights and securities guaranteed to persons by that instrument cannot be disregarded in respect to these artificial entities called corporations any more than they can be in respect to the individuals who are the equitable owners of the property belonging to such corporations. A State has no more power to deny to corporations the equal protection of the law than it has to individual citizens.

But it is said that it is not within the scope of the Fourteenth Amendment to withhold from States the power of classification, and that if the law deals alike with all of a certain class it is not obnoxious to the charge of a denial of equal protection. While, as a general proposition, this is undeniably true (*Hayes v. Missouri*, 120 U. S. 68; *Railroad Co. v. Mackey*, 127 U. S. 205; *Walston v. Nevin*, 128 U. S. 578; *Bell's Gap Railroad v. Pennsylvania*, 134 U. S. 232; *Pacific Express Co. v. Seibert*, 142 U. S. 339; *Giozza v. Tiernan*, 148 U. S. 657; *Columbia Southern Railway v. Wright*, 151 U. S. 470; *Marchant v. Pennsylvania Railroad*, 153 U. S. 380; *St. Louis & San Francisco Railway v. Mathews*, 165 U. S. 1), yet it is equally true that such classification cannot be made arbitrarily. The State may not say that all white men shall be subjected to the payment of the attorney's fees of parties successfully suing them and all black men not. It may not say that all men beyond a certain age shall be alone thus subjected, or all men possessed of a certain wealth. These are distinctions which do not furnish any proper basis for the attempted classification. That must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis.

As well said by Black, J., in *State v. Loomis*, 115 Missouri, 307, 314, in which a statute making it a misdemeanor for any corporation engaged in manufacturing or mining to issue in payment of the wages of its employees any order, check, etc., payable otherwise than in lawful money of the United States, unless negotiable and redeemable at its face value in cash or in goods and supplies at the option of the holder at the store or other place of business of the corporation, was held class legislation and void: "Classification for legislative purposes must have some reasonable basis upon which to stand. It must be evident that differences which would serve for a classification for some purposes furnish no reason whatever for a classification for legislative purposes. The differences which will support class legislation must be such as in the nature of things furnish a reasonable basis for separate

laws and regulations. Thus the legislature may fix the age at which persons shall be deemed competent to contract for themselves, but no one will claim that competency to contract can be made to depend upon stature or color of the hair. Such a classification for such a purpose would be arbitrary and a piece of legislative despotism, and therefore not the law of the land."

In *Vanzant v. Waddel*, 2 Yerger, 260, 270, Catron, J. (afterward Catron, J., of this court), speaking for the Supreme Court of Tennessee, declared: "Every partial or private law, which directly proposes to destroy or affect individual rights, or does the same thing by affording remedies leading to similar consequences, is unconstitutional and void. Were this otherwise, odious individuals and corporate bodies would be governed by one rule, and the mass of the community, who made the law, by another."

In *Dibrell v. Morris' Heirs*, Supreme Court of Tennessee, 15 S. W. Rep. 87, 95, Baxter, Special Judge, reviewing at some length cases of classification, closes the review with these words: "We conclude, upon a review of the cases referred to above, that, whether a statute be public or private, general or special, in form, if it attempts to create distinctions and classifications between the citizens of this State, the basis of such classification must be natural and not arbitrary." *limit* *ref.* *legislation*

In *Bell's Gap Railroad v. Pennsylvania*, 134 U. S. 232, the question was presented as to the power of the State to classify for purposes of taxation, and while it was conceded that a large discretion in these respects was vested in the various legislatures, the fact of a limit to such discretion was recognized, the court, by Bradley, J., saying, on page 237: "All such regulations, and those of like character, so long as they proceed within reasonable limits and general usage, are within the discretion of the State legislature or the people of the State in framing their Constitution. But clear and hostile discriminations against particular persons and classes, especially such as are of an unusual character, unknown to the practice of our governments, might be obnoxious to the constitutional prohibition."

It is, of course, proper that every debtor should pay his debts, and there might be no impropriety in giving to every successful suitor attorney's fees. Such a provision would bear a reasonable relation to the delinquency of the debtor, and would certainly create no inequality of right or protection. But before a distinction can be made between debtors, and one be punished for a failure to pay his debts, while another is permitted to become in like manner delinquent without any punishment, there must be some difference in the obligation to pay, some reason why the duty

of payment is more imperative in the one instance than in the other.

If it be said that this penalty is cast only upon corporations, that to them special privileges are granted, and therefore upon them special burdens may be imposed, it is a sufficient answer to say that the penalty is not imposed upon all corporations. The burden does not go with the privilege. Only railroads, of all corporations, are selected to bear this penalty. The rule of equality is ignored.

It may be said that certain corporations are chartered for charitable, educational, or religious purposes, and abundant reason for not visiting them with a penalty for the non-payment of debts is found in the fact that their chartered privileges are not given for pecuniary profit. But the penalty is not imposed upon all business corporations, all chartered for the purpose of private gain. The banking corporations, the manufacturing corporations and others like them are exempt. Further, the penalty is imposed not upon all corporations charged with the *quasi* public duty of transportation, but only upon those charged with a particular form of that duty. So the classification is not based on any idea of special privileges by way of incorporation, nor of special privileges given thereby for purposes of private gain, nor even of such privileges granted for the discharge of one general class of public duties.

But if the classification is not based upon the idea of special privileges, can it be sustained upon the basis of the business in which the corporations to be punished are engaged? That such corporations may be classified for some purposes is unquestioned. The business in which they are engaged is of a peculiarly dangerous nature, and the legislature, in the exercise of its police powers, may justly require many things to be done by them in order to secure life and property. Fencing of railroad tracks, use of safety couplers, and a multitude of other things easily suggest themselves. And any classification for the imposition of such special duties—duties arising out of the peculiar business in which they are engaged—is a just classification, and not one within the prohibition of the Fourteenth Amendment. Thus it is frequently required that they fence their tracks, and as a penalty for a failure to fence double damages in case of loss are inflicted. *Missouri Pacific Railway v. Humes*, 115 U. S. 512. But this and all kindred cases proceed upon the theory of a special duty resting upon railroad corporations by reason of the business in which they are engaged—a duty not resting upon others; a duty which can be enforced by the legislature in any proper manner; and whether it enforces it by penalties in the way of fines coming to the State,

or by double damages to a party injured, is immaterial. It is all done in the exercise of the police power of the State and with a view to enforce just and reasonable police regulations.

While this action is for stock killed, the recovery of attorney's fees cannot be sustained upon the theory just suggested. There is no fence law in Texas. The legislature of the State has not deemed it necessary for the protection of life or property to require railroads to fence their tracks, and as no duty is imposed, there can be no penalty for non-performance. Indeed, the statute does not proceed upon any such theory; it is broader in its scope. Its object is to compel the payment of the several classes of debts named, and was so regarded by the Supreme Court of the State.

But a mere statute to compel the payment of indebtedness does not come within the scope of police regulations. The hazardous business of railroading carries with it no special necessity for the prompt payment of debts. That is a duty resting upon all debtors, and while in certain cases there may be a peculiar obligation which may be enforced by penalties, yet nothing of that kind springs from the mere work of railroad transportation. Statutes have been sustained giving special protection to the claims of laborers and mechanics, but no such idea underlies this legislation. It does not aim to protect the laborer or the mechanic alone, for its benefits are conferred upon every individual in the State, rich or poor, high or low, who has a claim of the character described. It is not a statute for the protection of particular classes of individuals supposed to need protection, but for the punishment of certain corporations on account of their delinquency.

Neither can it be sustained as a proper means of enforcing the payment of small debts and preventing any unnecessary litigation in respect to them, because it does not impose the penalty in all cases where the amount in controversy is within the limit named in the statute. Indeed, the statute arbitrarily singles out one class of debtors and punishes it for a failure to perform certain duties—duties which are equally obligatory upon all debtors; a punishment not visited by reason of the failure to comply with any proper police regulations, or for the protection of the laboring classes, or to prevent litigation about trifling matters, or in consequence of any special corporate privileges bestowed by the State. Unless the legislature may arbitrarily select one corporation or one class of corporations, one individual or one class of individuals, and visit a penalty upon them which is not imposed upon others guilty of like delinquency, this statute cannot be sustained.

But arbitrary selection can never be justified by calling it classification. The equal protection demanded by the Fourteenth Amendment forbids this. No language is more worthy of fre-

quent and thoughtful consideration than these words of Matthews, J., speaking for this court, in *Yick Wo v. Hopkins*, 118 U. S. 356, 369: "When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power." The first official action of this nation declared the foundation of government in these words: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty, and the pursuit of happiness." While such declaration of principles may not have the force of organic law, or be made the basis of judicial decision as to the limits of right and duty, and while in all cases reference must be had to the organic law of the nation for such limits, yet the latter is but the body and the letter of which the former is the thought and the spirit, and it is always safe to read the letter of the Constitution in the spirit of the Declaration of Independence. No duty rests more imperatively upon the courts than the enforcement of those constitutional provisions intended to secure that equality of rights which is the foundation of free government.

Questions of this character have been frequently presented to the courts, and it is well to notice a few of the decisions. In Alabama a statute provided that a railroad corporation, or any complainant against it, taking an appeal from a judgment of a justice of the peace in a suit for damages to live stock, and failing to sustain such appeal, should be liable for a reasonable attorney's fee incurred by reason thereof. Code Alabama, 1876, § 1715. This statute was less obnoxious to the charge of discrimination than the one before us, in that it gave the same right to the corporation as to its adversary, and it was limited to cases in which an appeal was taken from a judgment already rendered by a competent judicial officer; yet the Supreme Court of that State, *South & North Alabama Railroad v. Morris*, 64 Alabama, 193, 199, held it in conflict with both the State and the Fourteenth Amendment to the United States Constitution, saying: "Justice cannot be sold or denied by the exaction of a pecuniary consideration for its enjoyment from one, when it is given freely and open-handed to another, without money and without price. Nor can it be permitted that litigants shall be debarred from the free exercise of this constitutional right by the imposition of arbitrary, unjust, and odious discriminations, perpetrated under color of establishing peculiar rules for a particular occupation. Unequal, partial, and discriminatory legislation, which secures this right to some

avored class or classes and denies it to others, who are thus excluded from that equal protection designed to be secured by the general law of the land, is in clear and manifest opposition to the letter and spirit of the foregoing constitutional provisions." And again: "The section of the code under consideration (1715) prescribes a regulation of a peculiar and discriminative character in reference to certain appeals from justices of the peace. It is not general in its provisions or applicable to all persons, but is confined to such as own or control railroads only; and it varies from the general law of the land by requiring the unsuccessful appellant, in this particular class of cases, to pay an attorney's tax fee not to exceed twenty dollars. A law which would require all farmers who raise cotton to pay such a fee in cases where cotton was the subject-matter of litigation and the owners of this staple were parties to the suit would be so discriminating in its nature as to appear manifestly unconstitutional; and one which should confine the tax alone to physicians or merchants or ministers of the gospel would be glaring in its obnoxious repugnancy to those cardinal principles of free government which are found incorporated, perhaps, in the bill of rights of every State Constitution of the various commonwealths of the American Government."

In Mississippi an act somewhat similar in its nature, Laws Miss. 1882, p. 110, was adjudged unconstitutional (*Chicago, St. Louis, etc., Railroad v. Moss*, 60 Mississippi, 641), the court saying, on page 646: "The right of appeal cannot be fettered and clogged with reference to the parties litigant or the attitude they occupy as plaintiff or defendant. All litigants, whether plaintiff or defendant, should be regarded with equal favor by the law, and before the tribunals for administering it, and should have the same right to appeal with others similarly situated. All must have the equal protection of the law and its instrumentalities. The same rule must exist for all in the same circumstances."

In Michigan a statute was passed, Laws of Michigan, 1885, c. 234, authorizing the taxing of an attorney's fee of twenty-five dollars in actions against a railroad company for damages for cattle killed, and the Supreme Court of that State held it unconstitutional (*Wilder v. Chicago & West Michigan Railroad*, 70 Michigan, 382), saying on page 384: "Corporations have equal rights with natural persons as far as their privileges in the courts are concerned. They can sue and defend in all courts the same as natural persons, and the law must be administered as to them with the same equality and justice which it bestows upon every suitor, and without which the machinery of the law becomes the engine of tyranny. This statute proposes to punish a railroad company for defending a suit brought against it with a penalty of

\$25, if it fails to successfully maintain its defense. The individual sues for the loss of his cow, and if it is shown that such loss was occasioned by his own neglect, and through no fault of the company, and he thereby loses his suit, the railroad company can recover only the ordinary statutory costs of \$10 in the justice's court, but if he succeeds because of the negligence of the company, the plaintiff is permitted to tax the \$10 and an additional penalty of \$25; for it is nothing more or less than a penalty. Calling it an 'attorney's fee' does not change its real nature or effect. It is a punishment to the company, and a reward to the plaintiff, and an incentive to litigation on his part. This inequality and injustice cannot be sustained upon any principle known to the law. It is repugnant to our form of government, and out of harmony with the genius of our free institutions. The legislature cannot give to one party in litigation such privileges as will arm him with special and important pecuniary advantages over his antagonist." *Lafferty v. Chicago & West Michigan Railway*, 71 Michigan, 35.

So, in Arkansas, an act was passed providing that when stock was killed by a railroad company the owner might demand an appraisement, and that if the appraised value was not paid within a certain time and an action was brought, an attorney's fee for the plaintiff might be taxed and collected; but it was held by the Supreme Court, St. Louis, etc., *Railway v. Williams*, 49 Arkansas, 492, that such legislation could not be sustained. It was construed to be an act imposing a penalty for a failure to abide by an award of appraisers and contesting its validity in the courts. It is worthy of note that in the same volume is found a decision by the same court, sustaining a statute allowing an attorney's fee in actions for the recovery of overcharges by railroads. *Dow v. Beidelman*, 49 Arkansas, 455. But the statute had prescribed the rates of charge for the carriage of passengers by railroads, had forbidden an overcharge, and it was as a penalty for failure to comply with such police regulations that the allowance of an attorney's fee was sustained. See also *Jolliffe v. Brown*, Supreme Court of Washington, 14 Wash. 155, in which, it appearing that there was no statutory obligation on railroad companies to fence their right of way, a statute allowing attorney's fees in actions to recover damages for stock killed was declared to be unconstitutional; and *Grand Rapids Chair Co. v. Runnels*, 77 Michigan, 104, in which an act authorizing an attorney's fee to be taxed in entering judgments for personal services was set aside.

Besides these cases involving attorneys' fees are others in which legislation imposing special burdens on an individual or a class has been declared beyond the power of the legislature as against

equality of right. In *San Antonio, etc., Railway v. Wilson*, 19 S. W. Rep. 910, the Court of Appeals of Texas held that a statute providing that in the event of a railroad company's refusing to pay its indebtedness to an employee within twenty days after demand, he could recover as damages twenty per cent. in addition to the amount due, was class legislation and unconstitutional. In the course of the opinion, after referring to those statutes allowing double damages for stock killed, the court observed: "But when we consider the relations of railway companies to their own servants, both as to contracts of employment and payment, we find a field in which special legislation has no right ordinarily to enter, and in which railways stand on the same footing with all other corporations or persons." In *Atchison & Nebraska Railroad v. Baty*, 6 Nebraska, 37, there was presented for consideration a statute which gave to the owner of live stock accidentally killed or destroyed on a railroad track double its value, and it was held that the statute was void. *Millet v. People*, 117 Illinois, 294, in which an act of the legislature requiring owners and operators of coal mines to weigh coal in a certain specified manner, was held invalid as beyond the power of the legislature to single out certain individuals and impose upon them burdens not imposed upon all. *Frorer v. People*, 141 Illinois, 171, where an act which prohibited persons engaged in mining or manufacturing from keeping a store for furnishing supplies to their employees was held in conflict with the Constitution. *Braceville Coal Co. v. People*, 147 Illinois, 66, where a like ruling was made in respect to a statute requiring certain specified corporations to pay the wages of their employees weekly. *Eden v. People*, 161 Illinois, 296, which set aside a statute forbidding barbers, and barbers only, to keep open their shops or work at their trade on Sundays. *Durkee v. Janesville*, 28 Wisconsin, 464, in which an act providing that no costs should be recovered against the city in an action commenced to set aside any assessment or tax deed, or to prevent the collection of taxes in said city, was held to conflict with the rule of equality in that suitors in all other cases were entitled to recover their costs, the court saying, on page 471, that "it is obvious there can be no certain remedy in the laws, where the legislature may prescribe one rule for one suitor or class of suitors in the courts, and another for all others under like circumstances, or may discriminate between parties to the same suit, giving one most unjust pecuniary advantage over the other. Parties thus discriminated against would not obtain justice freely, and without being obliged to purchase it. To the extent of such discrimination they would be obliged to buy justice and pay for it, thus making it a matter of purchase to those who could afford to pay, contrary to the letter

and spirit of this provision." *Janesville v. Carpenter*, 77 Wisconsin, 288, in which a statute authorizing suits for injunction to be maintained in favor of certain parties under circumstances differing from those which obtained in respect to all other suits of a similar nature, was likewise held to be void, as discriminating and class legislation, in violation of the spirit of the Constitution, and contrary to public justice.

In *State v. Goodwill*, 33 West Va. 179, the Supreme Court of Appeals of West Virginia held unconstitutional a statute which prohibited persons engaged in mining and manufacturing from issuing for the payment of labor any order or paper except such as was specified in the act; and on the same day in *State v. Fire Creek Coal & Coke Co.*, 33 West Va. 188, the same court also set aside another statute which prohibited persons and corporations engaged in mining and manufacturing and interested in selling merchandise and supplies, from selling any merchandise or supplies to their employees at a greater per cent. of profit than they sell to others not employed by them. In *Park v. The Free Press Co.*, 72 Michigan, 560, it was held that an act limiting the recovery in suits brought for libel in certain cases to actual damages as defined in the act, was not within the scope of constitutional legislation. In *Pearson v. Portland*, 69 Maine, 278, a statute which provided that no damages for injury to person or property caused by a defect in the highway could be recovered of any city or town by any person who, at the time the damage was done, was a resident of any country where damage done under similar circumstances was not by the laws of that country recoverable, was held to connict with the equality clause of the Fourteenth Amendment of the United States Constitution.

It must not be understood that by citing we endorse all these decisions. Our purpose is rather to show the extent to which the courts of the various States have gone in enforcing the constitutional obligation of equal protection. Other cases of a similar character may be found in the reports, but a mere accumulation of authorities is of little value. It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the Fourteenth Amendment, and that in all cases it must appear not only that a classification has been made, but also that it is one based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification—and is not a mere arbitrary selection. Tested by these principles the statute in controversy cannot be sustained. The judgment of the Supreme Court of Texas is therefore reversed, and the case is remanded for further proceedings not consistent with this opinion.

GRAY, J., with whom concurred FULLER, Ch. J., and WHITE, J., dissenting.

The Chief Justice, White, J., and myself are unable to concur in this judgment. The grounds of our dissent may be briefly stated.

Costs in civil actions at law are the creature of statute. From early times there have been statutes making different rules as to costs, according to the nature of the issue, and the amount involved; and sometimes allowing costs to the prevailing party when plaintiff, and not when defendant. The whole matter of costs, including the party to or against whom they may be given, the items or sums to be allowed, and the right to costs as depending upon the nature of the suit, upon the amount or value of the thing sued for or recovered, or upon other circumstances, is and always has been within the regulation and control of the legislature, exercising its discretionary power, not oppressively to either party, but as the best interests of the litigants and of the public may appear to it to demand. *Bac. Ab., Costs, passim*; *Postan v. Stanway*, 5 East, 261; *Green v. Lister*, 8 Cranch, 229, 242; *Kneass v. Schuylkill Bank*, 4 Wash. C. C. 106; *Lowe v. Kansas*, 163 U. S. 81.

The statute of the State of Texas, now in question, does but enact that any person having a valid *bona fide* claim, not exceeding fifty dollars, against a railroad corporation, for personal services or damages, or for overcharges on freight, or for destruction or injury of stock by its trains, and presenting the claim, verified by his affidavit, to the corporation, and, if it is not paid within thirty days, suing thereon in the proper court, and finally obtaining judgment for the full amount thereof in that court, or in any court to which the suit may be appealed, shall be entitled to recover, in addition to other costs, a reasonable attorney's fee (if he has employed an attorney) not exceeding ten dollars, to be assessed and awarded by the court or jury trying the issue. *Texas Gen. Laws of 1889, c. 107, p. 131*; *Sayles's Supplement, art. 4266a, p. 768*. In other words, if an honest claim, of not more than fifty dollars, and coming within one of those classes of small claims which most commonly arise between individuals and railroad corporations, is not promptly paid when presented under oath, and the claimant is thereby compelled to resort to a suit, the corporation, if ultimately cast in the suit, must pay to the successful plaintiff a very moderate attorney's fee, as part of the costs of the litigation.

The legislature of a State must be presumed to have acted from lawful motives, unless the contrary appears upon the face of the statute. If, for instance, the legislature of Texas was satisfied,

from observation and experience, that railroad corporations within the State were accustomed, beyond other corporations or persons, to unconscionably resist the payment of such petty claims, with the object of exhausting the patience and the means of the claimants, by prolonged litigation and perhaps repeated appeals, railroad corporations alone might well be required, when ultimately defeated in a suit upon such a claim, to pay a moderate attorney's fee, as a just, though often inadequate, contribution to the expenses to which they had put the plaintiff in establishing a rightful demand. Whether such a state of things as above supposed did in fact exist, and whether, for that or other reasons, sound policy required the allowance of such a fee to either party, or to the plaintiff only, were questions to be determined by the legislature, when dealing with the subject of costs, except in so far as it saw fit to commit the matter to the decision of the courts.

The constitutionality of statutes allowing plaintiffs only to recover an attorney's fee, as part of the judgment, in particular classes of actions selected by the legislature, appears to have been upheld by the courts of most of the States in which it has been challenged. *Kansas Pacific Railway v. Mower*, 16 Kansas, 573, 582; *Same v. Yanz*, 16 Kansas, 583; *Peoria, etc., Railway v. Dugan*, 109 Illinois, 537; *Vogel v. Pekoc*, 157 Illinois, 339; *Dow v. Beidelman*, 49 Arkansas, 455; *Perkins v. St. Louis, etc., Railway*, 103 Missouri, 52; *Burlington, etc., Railway v. Dey*, 82 Iowa, 312, 340; *Wortman v. Kleinschmidt*, 12 Montana, 316; *Gulf, Colorado & Santa Fé Railroad v. Ellis*, 87 Texas, 19; *Cameron v. Chicago, etc., Railway*, 63 Minn. 384.

It is to be regretted that so important a precedent, as this case may afford, for interference by the national judiciary with the legislation of the several States on little questions of costs, should be established upon argument *ex parte* in behalf of the railroad corporation, without any argument for the original plaintiff. But it is hardly surprising that the owner of a claim for fifty dollars only, having been compelled to follow up, through all the courts of the State, the contest over this ten dollar fee, should at last have become discouraged, and unwilling to undergo the expense of employing counsel to maintain his rights before this court.

THE PEOPLE OF THE STATE OF NEW YORK, APPELLANTS, v. THE NEW YORK CENTRAL & HUDSON RIVER RAILROAD CO., RESPONDENT.

IN THE SUPREME COURT OF NEW YORK, JANUARY TERM, 1883.

[*Reported in 28 Hun 543.*]

APPEALS from orders of the Special Term, granting motions to quash and dismiss the petitions and orders to show cause of the appellants, and denying the application of the appellants for peremptory writs of mandamus.

Upon the facts set forth in the petition and accompanying affidavits, an order was made in each of the above entitled proceedings requiring the respondent to show cause "why a peremptory writ of mandamus to compel the said corporation to exercise its franchises, and to receive and transport freight upon such terms as are reasonable and usual, and to perform its duties as a common carrier" should not issue in each case.

Leslie W. Russell, Attorney-General, and *E. C. James*, *Simon Sterne*, and *Daniel G. Thompson* for the appellants.

W. D. Shipman and *Roscoe Conkling* for the respondents.

DAVIS, P. J. The appellants, upon the petition of their Attorney-General, and affidavits accompanying the same, obtained orders from one of the justices of this court requiring the respondents, respectively, to show cause, upon service of less than eight days, at a Special Term sitting at chambers, why a peremptory writ of mandamus should not issue, commanding the respondents, respectively, to forthwith resume the discharge of their duties as common carriers, and the exercise of their franchise, by promptly receiving, transporting, and delivering all such freight or other property as might be offered to or had been heretofore received by them for transportation at their stations, in and to the city of New York, upon the usual and reasonable terms and charges.

Upon an adjourned day for the hearing of the motions, the respondents appeared by counsel and objected that the moving papers failed to show any grounds for the relief prayed for; and moved "to quash and dismiss said petitions and orders to show cause." The court entertained this motion, and, against the objection of the appellants, awarded the right to open and close the argument on the hearing to the counsel for the respondents; and after hearing the respective counsel, the court in each case ordered as follows: "That the said preliminary objection be and the same is hereby sustained, and that the motion to quash the said petition

and order to show cause be and the same is hereby granted, and the said application of the said petitioner denied."

It is now objected that this mode of disposing of the motions was so far irregular as to render the orders erroneous.

The right of appeal was not affected, and we think it is our duty to hear and dispose of the appeal upon the merits. The practice at the Special Term should, however, be discountenanced as a precedent.¹

The question presented by the motion is one of signal importance. It is whether the people of the State can invoke the power of the courts to compel the exercise by railroad corporations of the most useful public functions with which they are clothed. If the people have that right, there can be no doubt that their Attorney-General is the proper officer to set it in effective operation on their behalf. 1 R. S. 179, § 1; Code of Civ. Proc., § 1993; *People v. Halsey*, 37 N. Y. 344; *People v. Collins*, 19 Wend. 56.

The question involves a consideration of the nature of this class of corporations, the objects for which they are created, the powers conferred, and the duties imposed upon them by the laws of their creation, and of the State. As bodies corporate, their ownership may be and usually is altogether private, belonging wholly to the holders of their capital stock; and their management may be vested in such officers or agents as the stockholders and directors under the provisions of law may appoint. In this sense they are to be regarded as trading or private corporations, having in view the profit or advantages of the corporators. But these conditions are in no just sense in conflict with their obligations and duties to the public. The objects of their creation are from their very nature largely different from those of ordinary private and trading corporations. Railroads are, in every essential quality, public highways, created for public use, but permitted to be owned, controlled, and managed by private persons. But for this quality the railroads of the respondents could not lawfully exist. Their construction depended upon the exercise of the right of eminent domain, which belongs to the State in its corporate capacity alone, and cannot be conferred, except upon a "public use." The State has no power to grant the right of eminent domain to any corporation or person for other than a public use. Every attempt to go beyond that is void by the Constitution; and, although the legislature may determine what is a necessary public use, it cannot by any sort of enactment divest of that character any portion of the right of eminent domain which it may confer. This characteristic of public use is in no sense lost or diminished by the fact that the

¹So much of the opinion as relates to the question of practice has been omitted.—Ed.

use of the railroad by the corporation which constructs or owns it must, from its nature, be exclusive. That incident grows out of the method of use which does not admit of any enjoyment in common by the public. The general and popular use of a railroad as a highway is therefore handed over exclusively to corporate management and control because that is for the best and manifest advantage of the public. The progress of science and skill has shown that highways may be created for public use, of such form and kind that the best and most advantageous enjoyment by the people can only be secured through the ownership, management, and control of corporate bodies created for that purpose, and the people of the State are not restricted from availing themselves of the best modes for the carriage of their persons and property. There is nothing in the Constitution hostile to the adoption and use by the State of any and every newly developed form or kind of travel and traffic, which have a public use for their end and aim, and giving to them vital activity by the use of the power of eminent domain.

When the earliest Constitution of our State was adopted, railroads were unknown. The public highways of the State were its turnpikes, ordinary roads and navigable waters. The exercise of eminent domain in respect of them was permitted by the Constitution for the same reasons that adapt it now to the greatly improved methods of travel and transportation; and in making this adaptation, there is no enlarged sense given to the language of the Constitution, so long as its inherent purpose—the creation only of public uses—be faithfully observed.

These principles are abundantly sustained by authority. In *Bloodgood v. The Mohawk & Hudson River Railroad Co.*, 18 Wend. 9, the court of last resort in this State first announced them, and affixed to railroads their true character as public highways. It is there declared that the fact that railroad corporations may remunerate themselves by tolls and fares, “does not destroy the public nature of the road, or convert it from a public to a private use. . . . If it is a public franchise and granted to the company for the purpose of providing a mode of public conveyance, the company, in accepting it, engages, on its part, to use it in such manner as will accomplish the object for which the legislature designed it.” Pp. 21, 22. And in *Olcott v. The Supervisors*, 16 Wall. 678, p. 694, the Supreme Court of the United States adjudge: “That railroads, though constructed by private corporations and owned by them, are public highways has been the doctrine of nearly all the courts ever since such conveniences for passage and transportation have had any existence. Very early the question arose whether a State’s right of eminent

domain could be exercised by a private corporation created for the purpose of constructing a railroad. Clearly it could not, unless taking land for such a purpose by such an agency is taking land for public use. The right of eminent domain nowhere justifies taking property for private use. Yet it is a doctrine universally accepted, that a State legislature may authorize a private corporation to take land for the construction of such a road, making compensation to the owner. What else does this doctrine mean, if not that building a railroad, though it be built by a private corporation, is an act done for a public use? And the reason why the use has always been held a public one is that such a road is a highway, whether made by the Government itself, or by the agency of corporate bodies, or even by individuals, when they obtain their power to construct it from legislative grant. . . . Whether the use of a railroad is a public or a private one, depends in no measure upon the question who constructed it or who owns it. It has never been considered a matter of any importance that the road was built by the agency of a private corporation. No matter who is the agent, the function performed is that of the State. Though the ownership is private, the use is public. . . . The owners may be private companies, but they are compellable to permit the public to use their works in the manner in which such works can be used. That all persons may not put their own cars upon the road, and use their own motive power, has no bearing upon the question whether the road is a public highway. It bears only upon the mode of use, of which the legislature is the exclusive judge."

All public highways are subjects of general State jurisdiction, because their uses are the common property of the public. This principle of the common law is in this State of universal application. As to the class of public highways known as railroads, the common law is fortified by the express conditions of the statutes creating or regulating or controlling them.

The general railroad act of this State may now be regarded as the general charter of all such corporations. It authorizes the organization of corporations for "the constructing, maintaining, and operating" of railroads "for public use," and it imposes upon them the duty "to furnish accommodations for all passengers and property, and to transport all persons and property on payment of fare or freight." Laws of 1850, c. 140, §§ 1, 36. These words are a brief summary in respect of the duties imposed upon such corporations by all the provisions of the act. Those duties are assigned to them as public trusts, and as was said in *Messenger v. The Pennsylvania Railroad Co.*, 36 N. J. 407, "although in the hands of a private corporation, they are still sovereign franchises,

and must be used and treated as such; they must be held in trust for the general good." This relation of such a corporation to the State is forcibly expressed by Emmons, J., in *Talcott v. Township of Pine Grove*, 1 Flippin U. S. Cir. Ct. Rep. 144: "The road once constructed is, *instanter*, and by mere force of the grant and law, embodied in the governmental agencies of the State and dedicated to public use. All and singular its cars, engines, rights of way, and property of every description, real, personal, and mixed, are but a trust fund for the political power, like the functions of a public office. The judicial personage—the corporation created by the sovereign power expressly for this sole purpose and no other—is, in the most strict technical and unqualified sense, but its trustee. This is the primary and sole legal political motive for its creation. The incidental interest and profits of individuals are accidents, both in theory and practice."

The acceptance of such trusts on the part of a corporation by the express and implied contracts already referred to, makes it an agency of the State to perform public functions which might otherwise be devolved upon public officers. The maintenance and control of most other classes of public highways are so devolved, and the performance of every official duty in respect of them may be compelled by the courts, on application of the State, while private damages may also be recoverable for individual injuries. The analogy between such officials and railroad corporations in regard to their relations to the State is strong and clear, and so far as affects the construction and proper and efficient maintenance of their railways will be questioned by no one. It is equally clear, we think, in regard to their duty as carriers of persons and property. This springs sharply out of the exclusive nature of their right to do those things. On other public highways every person may be his own carrier; or he may hire whomsoever he will to do that service. Between him and such employee a special and personal relation exists, independent of any public duty, and in which the State has no interest. In such a case, the carrier has not contracted with the State to assume the duty as a public trust, nor taken the right and power to do it from the State by becoming the special donee and depositary of a trust. A good reason may, therefore, be assigned why the State will not by mandamus enforce the performance of his contract by such a carrier. But the reason for such a rule altogether fails when the public highway is the exclusive property of a body corporate, which alone has power to use it, in a manner which of necessity requires that all management, control, and user for the purposes of carriage must be limited to itself, and which, as a condition of the franchise that grants such absolute and exclusive power over and user of a public

highway, has contracted with the State to accept the duty of carrying all persons and property within the scope of its charter, as a public trust. The relation of the State to such a body is entirely different from that which it bears to the individual users of a common highway, as between whom and the State no relation of trust exists; and there is small reason for seeking analogies between them. It is the duty of the State to make and maintain public highways. That duty it performs by a scheme of laws, which set in operation the functions of its political divisions into counties, towns, and other municipalities, and their officers. It can and does enforce those duties whenever necessary through its courts. It is not the duty of the State to be or become a common carrier upon its public highways; but it may, in some cases, assume that duty, and whenever it lawfully does so, the execution of the duty may be enforced against the agents or officers upon whom the law devolves it. It may grant its power to construct a public highway to a corporation or an individual, and with that power its right of eminent domain in order to secure the public use; and may make the traffic of the highway common to all on such terms as it may impose. In such case it is its duty to secure that common traffic, when refused, by the authority of its courts. *People v. Collins*, 19 Wend. 56; *People v. Commissioners of Salem*, 1 Cow. 23. Or it may grant the same powers of construction and maintenance with the exclusive enjoyment of use which the manner of use requires; and if that excludes all common travel and transportation it may impose on the corporation or person the duty to furnish every requisite facility for carrying passengers and freight, and to carry both in such manner and at such times as public needs may require. Why is that duty, in respect of the power to compel its performance through the courts, not in the category of all others intrusted to such a body? The writ of mandamus has been awarded to compel a company to operate its road as one continuous line (*Union Pacific Railroad Co. v. Hall*, 91 U. S. 343); to compel the running of passenger trains to the terminus of the road (*State v. H. & N. H. Railway Co.*, 29 Conn. 538); to compel the company to make fences and cattle guards (*People ex rel. Garbutt v. Rochester State Line Railroad Co.*, 14 Hun, 373; S. C., 76 N. Y. 294); to compel it to build a bridge (*People ex rel. Kimball v. B. & A. Railroad Co.*, 70 N. Y. 569); to compel it to construct its road across streams so as not to interfere with navigation (*State v. N. E. Railroad Co.*, 9 Richardson, 247); to compel it to run daily trains (*in re New Brunswick, etc., Railroad*, 1 P. & B. 667); to compel the delivery of grain at a particular elevator (*Chicago & Northwestern Railroad Co. v. People*, 56 Ill. 365); to compel the completion of its road (*Farm-*

ers' Loan and Trust Co. v. Henning, 17 Am. Law Reg. [N. S.] 266); to compel the grading of its track so as to make crossings convenient and useful (People *ex rel.* Green v. D. & C. R. Co., 58 N. Y. 152; N. Y. C. & H. R. Railroad Co. v. People, 12 Hun, 195; S. C., 74 N. Y. 302; Indianapolis Railroad Co. v. The State, 37 Ind. 489); to compel the re-establishment of an abandoned station (State v. Railroad, 37 Conn. 154); to compel the replacement of a track taken up in violation of its charter (Rex v. Severn & Wye Railway Co., 2 Barn. & Ald. 646); to prevent the abandonment of a road once completed (Talcott v. Pine Grove, *supra*, 1 Flippin, 145); and to compel a company to exercise its franchise (People v. A. & V. Railroad Co., 24 N. Y. 261). These are all express or implied obligations arising from the charters of the railroad companies, but not more so than the duty to carry freight and passengers. That duty is, indeed, the *ultima ratio* of their existence; the great and sole public good for the attainment and accomplishment of which all the other powers and duties are given or imposed. It is strangely illogical to assert that the State, through the courts, may compel the performance of every step necessary to bring a corporation into a condition of readiness to do the very thing for which it is created, but is then powerless to compel the doing of the thing itself.

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We cannot bring our minds to entertain a doubt that a railroad corporation is compellable by mandamus to exercise its duties as a carrier of freight and passengers; and that the power so to compel it rests equally firmly on the ground that that duty is a public trust, which having been conferred by the State and accepted by the corporation may be enforced for the public benefit; and also upon the contract between the corporation and the State, expressed in its charter or implied by the acceptance of the franchise (Abbott v. Johnstown Railroad Co., 80 N. Y. 31); and also upon the ground that the common right of all the people to travel and carry upon every public highway of the State has been changed, in the special instance, by the legislature for adequate reasons into a corporate franchise, to be exercised solely by a corporate body for the public benefit, to the exclusion of all other persons, whereby it has become the duty of the State to see to it that the franchise so put in trust be faithfully administered by the trustee.

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But it is said that the State is not injured and has no interest in the question whether the corporation perform the duty or not. The State may suffer no direct pecuniary injury, as it may not by the neglect of one or more of its numerous political officers who hold in trust for the people the official duties reposed in their hands; but that is no test of the power or duty of the State in either case. The sovereignty of the State is injured whenever any

public function vested by it in any person, natural or artificial, for the common good is not used or is misused, or is abused; and it is not bound to inquire whether some one or more of its citizens has not thereby received a special injury for which he may recover damages in his private suit. Such an injury wounds the sovereignty of the State and thereby, in a legal sense, injures the entire body politic. The State, in such a case as this, has no other adequate remedy. It may proceed, it is true, to annul the corporation, as has been held in many cases where corporations had neglected public duties. *People v. Fishkill & B. P. Railroad Co.*, 27 Barb. 452, 458; *People v. H. & C. Turnpike Co.*, 23 Wend. 254; *Turnpike Co. v. State*, 3 Wall. 210; *People v. K. & M. Turnpike Co.*, 23 Wend. 208; *People v. B. & R. Turnpike Co.*, *id.*, 222; *Charles River Bridge Co. v. Warren Bridge*, 7 Pick. 344. But that remedy is not adequate, for it only destroys functions where the public interests require their continued existence and enforcement. It has, therefore, an election which of these remedies to pursue. *State v. H. & N. H. Railroad Co.*, 29 Conn. 538; *People v. A. & V. Railroad Co.*, 24 N. Y. 261; *Talcott v. Pine Grove*, *supra*.

Undoubtedly a sound discretion is vested in its law officer to decide whether the exigency is such as to call for the use of either remedy, as it is ultimately for the court to judge whether the elected remedy should be applied. But upon the question of power and of sufficient legal injury to justify its use, where the corporation neglects or refuses to exercise its franchises or perform its duties, there seems to us no reason to doubt.

*Persons may
maintain
private actions*

Nor do we think the fact that injured individuals may have private remedies for the damages they have sustained by neglect of duties, precludes the State from its remedy by mandamus. Where the injury is to a single person under circumstances which do not affect the general public, the courts, in the exercise of their discretion, have properly refused this remedy on his relation. The injured party is then the suitor; he has an adequate remedy by private action for damages. That was the case of *People ex rel. Ohlen v. Erie Railway Co.*, 22 Hun, 533, relied upon by the court below, in which the court held that the relator's remedy was by suit for damages and not by mandamus. That case is not authority for denying the writ to the Attorney-General for a neglect or refusal by corporations to exercise their franchises to an extent which affects a great number of citizens, and continues for a considerable period of time; nor does it deny the right of the people acting on their own behalf and in their own suit to pursue this remedy in any case of neglect or refusal to exercise a public function which the interest of the people require should be kept in vigorous and efficient use.

The court, in that case, recognizes the distinction when it says "an exception exists," . . . "where a corporation suspends the exercise of its franchises." The suspension of the exercise of corporate functions is the gravamen of the complaint in this case; and the case cited is no authority for denying the writ when the people come into court with their own suit, by their Attorney-General, to move for a writ of mandamus on allegations of an alleged long-continued and very general suspension of a corporate duty.

It was supposed by the court below that the provisions of § 28 of the act of 1850 (c. 140) as amended by c. 133 of the Laws of 1880, which provide that railroad corporations shall have power "to regulate the time and manner in which passengers and property shall be transported," interfere in some way with the power to grant the writ. Undoubtedly that provision gives the discretion which the learned judge states; but it cannot be so construed as to justify a general or partial suspension of the duty of receiving and transporting freight. Language of that kind in a similar act was correctly construed by Dickerson, J., in the Railroad Commissioners v. Portland & Oxford Railroad Co., 63 Me. 269. We adopt, but have not room to quote his language.

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Having determined the question of the right of the State to prosecute the writ of mandamus on the ground of refusal or neglect of a corporation to exercise its duty of carrier, it remains to be seen whether a case which would justify the granting of the writ was presented. The case stands altogether upon the facts presented by the appellants. The course taken by the respondents must be regarded as an admission of the material facts contained in the petition and affidavits.

The petition in each case alleges that the said railroad company, since about the 16th day of June, 1882, "has substantially refused to discharge its duties as a common carrier, and has, to a material degree, suspended the exercise of its franchises by refusing to take freight which has been offered at its stations in the city of New York for transportation, at the usual rates and upon the usual terms;" and that said railway company "has refused to accept and transport the greater part of the outgoing, and to deliver the incoming freight and property of the merchants doing business in the city of New York, who have relations with and need for the services of such railway, and has refused to them to furnish adequate transportation for the same, so that from that date the business community of the city of New York are unable to obtain sufficient and adequate transportation for their goods on said railroad, although they have offered the same on the usual terms and rates of transportation; but said railroad has uniformly delayed

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and sometimes peremptorily refused to receive and deliver freight, and to transport the outgoing freight as aforesaid, and at certain points within the State has declined to receive incoming freight, whereby great loss and damages accrue to the people of the State of New York, for which there is no adequate remedy in damages, and that the trade and commerce of said city is greatly injured by the action of the said railroad."

These allegations are broad enough to show a quite general and largely injurious refusal and neglect to perform the duties of carrier. The affidavits go far to sustain these allegations; but it is not important to examine them minutely, because the omission of a demurrer *ore tenus* extends to and admits the well-pleaded averments of the petition. Stated very briefly, the affidavits show that, for about two weeks, the respondents failed and neglected to receive from three-quarters to seven-eighths of the goods offered for transportation from the city, and large quantities seeking transportation to the city; and in many instances refused to receive goods offered, and turned them back and closed their gates during business hours, thus causing a stoppage of all delivery of freight; that in some instances unusual terms were sought to be imposed as a condition of receiving goods, which would increase the risks of the owner; that the refusal to receive goods did not arise from any unwillingness or inability on the part of the shipper to pay charges, but was wholly the act of respondents; that it was so continuous and extensive that it seriously interfered with the business operations of the citizens of New York, deteriorated the value of many commodities, and caused a diversion of trade from the city; that great losses were caused, and especially that large quantities of perishable goods, by reason of non-delivery, were destroyed, to the value of many thousand dollars; that a vast amount of freight, equal, as estimated, to 360,000 tons, was thus detained or refused carriage; that large numbers of carmen were detained in their efforts to deliver freight, and the injury to that branch of business is estimated at not less than \$50,000, while the aggregate of injuries is estimated at some millions. These are the substantial facts conceded by the respondents at the Special Term. Surely it cannot be doubted that these facts, being true and unexcused, showed a strong case for the interference of the State.

The only question is, whether the course and conduct of the respondents was so far excused by anything appearing in the petition and affidavits that the court was justified in denying the motion for the writ on its merits, or in a wise exercise of its judicial discretion.

The excuse appears only in the statements of the reasons as-

signed by the respondents for their refusal to accept, transport and deliver the freight and property. In the petition it is stated in these words, "that the persons in their employ handling such freight refuse to perform their work unless some small advance, said to be three cents per hour, is paid them by the said railroad corporation." The affidavits show, it may in short be said, that the skilled freight handlers of the respondents, who had been working at the rate of seventeen cents per hour (or one dollar and seventy cents for ten hours), refused to work unless twenty cents per hour, or two dollars per day of ten hours, were paid, and that their abandonment of the work, and the inefficiency of the unskilled men afterward employed, caused the neglect and refusal complained of.

It is not alleged or shown that the workmen committed any unlawful act, and no violence, no riot, and no unlawful interference with other employees of the respondents appear. It is urged in effect that the court should regard the case as one of unlawful duress, caused by some breach of law sufficiently violent to prevent the reception and transportation of freight. There is nothing in the papers to justify this contention. According to the statements of the case, a body of laborers, acting in concert, fixed a price for their labor, and refused to work at a less price. The respondents fixed a price for the same labor, and refused to pay more. In doing this neither did an act violative of any law, or subjecting either to any penalty. The respondents had a lawful right to take their ground in respect of the price to be paid, and adhere to it, if they chose; but if the consequence of doing so were an inability to exercise their corporate franchises to the great injury of the public, they cannot be heard to assert that such consequence must be shouldered and borne by an innocent public, who neither directly nor indirectly participated in their causes.

If it had been shown that a "strike" of their skilled laborers had been caused or compelled by some illegal combination or organized body, which held an unlawful control of their actions, and sought through them to enforce its will upon the respondents, and that the respondents, in resisting such unlawful efforts, had refused to obey unjust and illegal dictation, and had used all the means in their power to employ other men in sufficient numbers to do the work, and that the refusal and neglect complained of had grown out of such a state of facts, a very different case for the exercise of the discretion of the court, as well as of the Attorney-General, would have been presented. Whether such a state of facts could have been shown or not we cannot judicially know. The present case must stand or fall upon the papers before us;

and we are not to be swerved from thus disposing of it by any suggestion of facts not in the case which might lead, if they appeared, to some other result. The most that can be found from the petition and affidavits is that the skilled freight handlers of the respondents refused to work without an increase of wages to the amount of three cents per hour; that the respondents refused to pay such increase; that the laborers then abandoned the work, and that the respondents did not procure other laborers competent or sufficient in number to do the work, and so the numerous evils complained of fell upon the public, and were continuous until the people felt called upon to step in and seek to remedy them by proceedings for mandamus.

See These facts reduce the question to this: Can railroad corporations refuse or neglect to perform their public duties upon a controversy with their employees over the cost or expense of doing them? We think this question admits of but one answer. The excuse has in law no validity. The duties imposed must be discharged at whatever cost. They cannot be laid down or abandoned or suspended without the legally expressed consent of the State. The trusts are active, potential, and imperative, and must be executed until lawfully surrendered, otherwise a public highway of great utility is closed or obstructed without any process recognized by law. This is something no public officer charged with the same trusts and duties in regard to other public highways can do without subjecting himself to mandamus or indictment.

We are not able to perceive the difficulties that embarrassed the court below as to the form of a writ of mandamus in such cases. It is true the writ must be specific as to the thing to be done; but the thing to be done in this case was to resume the duties of carriers of the goods and property offered for transportation; that is, to receive, carry, and deliver the same under the existing rules and regulations as the business had been accustomed to be done. There was no necessity to specify what kind of goods should be first received and carried, or whose goods, or indeed to take any notice of the details of the established usages of the companies. It was the people who were invoking the writ on their own behalf and not for some private suitor, or to redress individual injuries. The prayer of the petition indicated the proper form of the writ. Upon the return to the writ all questions, whether what has been done is a sufficient compliance with its commands, may properly arise and become a subject of further consideration. *People ex rel. Green v. D. & C. Railroad Co.*, 58 N. Y. 152, 160, 161. They need not have been anticipated. It is suggested that the time has now passed when such a writ can be of any valuable effect. This is probably

so, but we are governed by the record in disposing of the appeal and not by subsequently occurring events.

The appellants labor now under a judgment alleged to be injurious to the rights they possessed when it was pronounced, and harmful to them as a precedent. If erroneous they are entitled to have that judgment reversed, and to be indemnified, in the discretion of the court, for the costs incurred on the appeal made necessary by the error.

We think the court below had power to award the writ, and that upon the case presented it was error to refuse it.

The order should be reversed, with the usual costs, and an order entered, if deemed advisable from any existing circumstances by the Attorney-General, awarding the writ.

Daniels and Brady, JJ., concurred.

Orders reversed, with ten dollars costs and disbursements in each case.

NORTHERN PACIFIC RAILROAD CO. v. WASHINGTON
TERRITORY *ex rel.* DUSTIN.

IN THE SUPREME COURT OF THE UNITED STATES, JANUARY 4,
1892.

[Reported in 142 United States Reports 492.]

A PETITION in the name of the Territory of Washington, at the relation of the prosecuting attorney for the county of Yakima and four other counties in the Territory, was filed in the District Court of the Fourth Judicial District of the Territory, on February 20, 1885, for a mandamus to compel the Northern Pacific Railroad Co. to erect and maintain a station at Yakima City, on the Cascade branch of its railroad, extending from Pasco Junction on the Columbia River up the valley of the Yakima River, and through the county of Yakima, toward Puget Sound, and to stop its trains there to receive and deliver freight, and to receive and let off passengers.¹

The petition set forth at length the size and importance of Yakima City and its need of railroad accommodations; alleged that it was the county seat of Yakima County, a county having more than 4000 inhabitants, and had a court-house where courts of the United States and of the Territory were held, and a United States land office; that the defendant had refused to establish a

¹Only a portion of the statement of facts is given.—ED.

freight and passenger station or to stop its trains at Yakima City, but was building a freight and passenger station and stopping its trains at the rival town of North Yakima, four miles farther north, which it had laid out on its own unimproved land, and was ruining Yakima City for the purpose of enhancing the value of its own town site.

The answer, filed June 1, 1885, said nothing as to the courthouse; admitted that at the time of filing the petition there was a United States land office at Yakima City, but alleged that it had since been removed by order of the President of the United States to North Yakima; admitted that Yakima City heretofore had 500 inhabitants, but alleged that since the construction of the defendant's railroad two-thirds of them had removed with their houses and other buildings to North Yakima, and others were continually abandoning it, and no buildings or business were replacing those taken away; denied that it had laid out the town of North Yakima for the purpose of enhancing the value of its own property or for the purpose of injuring the property of any other person, town, or city; and alleged that there was not business enough to warrant more than one station on this part of its road, and that North Yakima was a much larger and more prosperous town than Yakima City ever was, and was a more convenient point for the people of the neighboring valleys, who were more than fifteen times as many, and had more than fifteen times as much taxable property, as the people living in Yakima City and its immediate vicinity.

The parties also made allegations and denials, and (after the filing of a replication not copied in the record) introduced evidence at the trial by a jury, as to the matters afterward stated in the special verdict, which was returned October 17, 1885, in answer to forty-six questions submitted by the court, and was in substance as follows:

In January, 1885, the defendant carried freight and passengers for hire on its railroad to and from Yakima City, and kept an agent there who attended to the freight and sold tickets to passengers. But before February 20, 1885, having completed its road to North Yakima, it ceased to stop its trains at Yakima City, and established a freight and passenger station at North Yakima; and, pursuant to sec. 4 of its charter, tendered its road to the United States as fully completed and equipped from Pasco Junction to or beyond Yakima City, and caused to be appointed by the President of the United States commissioners to examine and report on the condition of the road. On March 16, 1885, that part of its road from Pasco Junction by Yakima City to North Yakima had not been turned over to the operating department of

the company, but the freight and passenger trains were not run as subordinate to the construction of the road.

In January, 1885, Yakima City was the oldest and largest town, and the most important business centre, on the Cascade branch of the defendant's railroad, between the Columbia River and Puget Sound. On February 20, 1885, and when the defendant built and operated its road to Yakima City, the amount of business done at Yakima City annually was \$250,000, its population was 500, and there was no other town or business centre of any importance in Yakima County.

On October 17, 1885, Yakima City was the largest town, and the most important business centre in the county, except the town of North Yakima; the population of Yakima City was 150; there were seventy children attending school there; and it had two hotels, a flour mill, thirteen stores and places of business, twenty-seven dwelling houses and but a limited amount of industries requiring railroad facilities. The amount of business furnished by Yakima City to the defendant over that portion of its road between Pasco Junction and North Yakima in the summer of 1885 was in June 16,000 pounds, in July 4000 pounds, in August none, in September 2400 pounds, in October none; and during that period no product of Yakima City or the country adjoining was furnished by any one to be carried over the defendant's road.

There is a safe and suitable place for a freight and passenger station in Yakima City on the line of the defendant's road, and the defendant has the ability to construct and maintain such a station there, with freight and passenger facilities. If the defendant had done so, Yakima City would have retained its former size and importance. No demand was ever made upon the defendant for the establishment of a freight and passenger station there. The expense of constructing and fitting for practical use a station and warehouse at Yakima City would be about \$8000, and of keeping the requisite agents there \$150 a month. The wear and tear and cost of stopping a train at a station is \$1.

The passenger and freight traffic of the people living in the valleys of the streams entering the Yakima River at and near Yakima City and North Yakima, considering them as a community, would be better accommodated at North Yakima than at Yakima City. There are other stations for receiving freight and passengers on that part of the defendant's railroad, extending from Pasco Junction to North Yakima, called Yakima Division, furnishing sufficient facilities for all the country below North Yakima; and the earnings of that division are not sufficient to pay its running expenses.

On the verdict of the jury and the admissions in the pleadings,

each party moved for judgment; and on April 23, 1886, the District Court ordered a peremptory mandamus to issue, in accordance with the prayer of the petition. The record showed that the District Court during the previous proceedings in the case was held at Yakima City, but at the time of rendering judgment was held at North Yakima, to which the county seat and the courthouse had been removed pursuant to the statute of the Territory of January 9, 1886. Laws of Washington Territory of 1885-86, pp. 57, 457. On appeal to the Supreme Court of the Territory, the judgment of the District Court was affirmed. 3 Wash. Ter. 303. The defendant thereupon sued out this writ of error.

A. H. Garland for plaintiff in error. *James McNaught* and *H. J. May* were with him on the brief.

No appearance for defendant in error.

GRAY, J., after stating the case as above, delivered the opinion of the court.

A writ of mandamus to compel a railroad corporation to do a particular act in constructing its road or buildings, or in running its trains, can be issued only when there is a specific legal duty on its part to do that act, and clear proof of a breach of that duty.

If, as in *Union Pacific Railroad v. Hall*, 91 U. S. 343, the charter of a railroad corporation expressly requires it to maintain its railroad as a continuous line, it may be compelled to do so by mandamus. So if the charter requires the corporation to construct its road and to run its cars to a certain point on tide water (as was held to be the case in *State v. Hartford & New Haven Railroad*, 29 Conn. 538), and it has so constructed its road, and used it for years, it may be compelled to continue to do so. And mandamus will lie to compel a corporation to build a bridge in accordance with an express requirement of statute. *New Orleans, etc., Railway v. Mississippi*, 112 U. S. 12; *People v. Boston & Albany Railroad*, 70 N. Y. 569.

But if the charter of a railroad corporation simply authorizes the corporation, without requiring it, to construct and maintain a railroad to a certain point, it has been held that it cannot be compelled by mandamus to complete or to maintain its road to that point, when it would not be remunerative. *York & North Midland Railway v. The Queen*, 1 El. & Bl. 858; *Great Western Railway v. The Queen*, 1 El. & Bl. 874; *Commonwealth v. Fitchburg Railroad*, 12 Gray, 180; *State v. Southern Minnesota Railroad*, 18 Minn. 40.

The difficulties in the way of issuing a mandamus, to compel the maintenance of a railroad and the running of trains to a terminus fixed by the charter itself, are much increased when it is sought to compel the corporation to establish or to maintain a

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station and to stop its trains at a particular place on the line of its road. The location of stations and warehouses for receiving and delivering passengers and freight involves a comprehensive view of the interests of the public as well as of the corporation and its stockholders, and a consideration of many circumstances concerning the amount of population and business at, or near, or within convenient access to one point or another, which are more appropriate to be determined by the directors, or, in case of abuse of their discretion, by the legislature, or by administrative boards entrusted by the legislature with that duty, than by the ordinary judicial tribunals.

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The defendant's charter, after authorizing and empowering it to locate, construct, and maintain a continuous railroad "by the most eligible route, as shall be determined by said company," within limits described in the broadest way, both as to the terminal points and as to the course and direction of the roads; and vesting it with "all the powers, privileges, and immunities necessary to carry into effect the purposes of this act as herein set forth;" enacts that the road "shall be constructed in a substantial and workmanlike manner, with all the necessary draws, culverts, bridges, viaducts, crossings, turnouts, stations, and watering places, and all other appurtenances." The words last quoted are but a general expression of what would be otherwise implied by law, and cover all structures of every kind needed for the completion and maintenance of the railroad. They cannot be construed as imposing any specific duty, or as controlling the discretion in these respects of a corporation entrusted with such large discretionary powers upon the more important questions of the course and the termini of its road. The contrast between these general words and the specific requirements, which follow in the same section, that the rails shall be manufactured from American iron, and that "a uniform gauge shall be established throughout the entire length of the road," is significant.

To hold that the directors of this corporation, in determining the number, place and size of its stations and other structures, having regard to the public convenience as well as to its own pecuniary interests, can be controlled by the courts by writ of mandamus, would be inconsistent with many decisions of high authority in analogous cases.

P.

The Constitution of Colorado of 1876, art. 15, sec. 4, provided that "all railroads shall be public highways, and all railroad companies shall be common carriers;" and that "every railroad company shall have the right with its road to intersect, connect with, or cross any other railroad." Sec. 6 of the same article was as follows: "All individuals, associations, and corporations shall have

equal rights to have persons and property transported over any railroad in this State, and no undue or unreasonable discrimination shall be made in charges or facilities for transportation of freight or passengers within the State, and no railroad company, nor any lessee, manager, or employee thereof, shall give any preference to individuals, associations, or corporations in furnishing car or motive power." The General Laws of Colorado of 1877, c. 19, § 111, authorized every railroad company "to cross, intersect, or connect its railways with any other railway;" "to receive and convey persons and property on its railway;" and "to erect and maintain all necessary and convenient buildings and stations, fixtures and machinery, for the convenience, accommodation, and use of passengers, freights, and business interests, or which may be necessary for the construction or operation of said railway." This court held that sec. 6 of art. 15 of the Constitution of Colorado was only declaratory of the common law; that the right secured by sec. 4 to connect railroads was confined to their connection as physical structures, and did not imply a connection of business with business; and that neither the common law, nor the Constitution and statutes of Colorado, compelled one railroad corporation to establish a station or to stop its cars at its junction with the railroad of another corporation, although it had established a union station with the connecting railroad of a third corporation, and had made provisions for the transaction there of a joint business with that corporation. Waite, Ch. J., in delivering the opinion, said: "No statute requires that connected roads shall adopt joint stations, or that one railroad company shall stop at or make use of the station of another. Each company in the State has the legal right to locate its own stations, and, so far as statutory regulations are concerned, is not required to use any other. A railroad company is prohibited, both by the common law and by the Constitution of Colorado, from discriminating unreasonably in favor of or against another company seeking to do business on its road; but that does not necessarily imply that it must stop at the junction of one and interchange business there, because it has established joint depot accommodations and provided facilities for doing a connecting business with another company at another place. A station may be established for the special accommodation of a particular customer; but we have never heard it claimed that every other customer could, by a suit in equity, in the absence of a statutory or contract right, compel the company to establish a like station for his special accommodation at some other place. Such matters are, and always have been, proper subjects for legislative consideration, unless prevented by some charter contract; but, as a general rule, remedies for injustice of that kind can only

be obtained from the legislature. A court of chancery is not, any more than is a court of law, clothed with legislative power." *Atchison, Topeka & Santa Fé Railroad v. Denver & New Orleans Railroad*, 110 U. S. 667, 681, 682.

The Court of Appeals of New York, in a very recent case, refused to grant a mandamus to compel a railroad corporation to construct and maintain a station and warehouse of sufficient capacity to accommodate passengers and freight at a village containing 1200 inhabitants and furnishing to the defendant at its station therein a large freight and passenger business, although it was admitted that its present building at that place was entirely inadequate; that the absence of a suitable one was a matter of serious damage to large numbers of persons doing business at that station; that the railroad commissioners of the State, after notice to the defendant, had adjudged and recommended that it should construct a suitable building there within a certain time; and that the defendant had failed to take any steps in that direction, not for want of means or ability, but because its directors had decided that its interests required it to postpone doing so. The court, speaking by Danforth, J., while recognizing that "a plainer case could hardly be presented of a deliberate and intentional disregard of the public interest and the accommodation of the public," yet held that it was powerless to interpose; because the defendant, as a carrier, was under no obligation, at common law, to provide warehouses for freight offered, or station houses for passengers waiting transportation, and no such duty was imposed by the statutes authorizing companies to construct and maintain railroads "for public use in the conveyance of persons and property," and to erect and maintain all necessary and convenient buildings and stations "for the accommodation and use of their passengers, freight, and business;" and because, under the statutes of New York, the proceedings and determinations of the railroad commissioners amounted to nothing more than an inquest for information, and had no effect beyond advice to the railroad company and suggestion to the legislature, and could not be judicially enforced. The court said: "As the duty sought to be imposed upon the defendant is not a specific duty prescribed by statute, either in terms or by reasonable construction, the court cannot, no matter how apparent the necessity, enforce its performance by mandamus. It cannot compel the erection of a station house, nor the enlargement of one." "As to that, the statute imports an authority only, not a command, to be availed of at the option of the company in the discretion of its directors, who are empowered by statute to manage 'its affairs,' among which must be classed the expenditure of money for station buildings or other structures

for the promotion of the convenience of the public, having regard also to its own interest. With the exercise of that discretion the legislature only can interfere. No doubt, as the respondent urges, the court may by mandamus also act in certain cases affecting corporate matters, but only where the duty concerned is specific and plainly imposed upon the corporation." "Such is not the case before us. The grievance complained of is an obvious one, but the burden of removing it can be imposed upon the defendant only by legislation. The legislature created the corporation upon the theory that its functions should be exercised for the public benefit. It may add other regulations to those now binding it, but the court can interfere only to enforce a duty declared by law. The one presented in this case is not of that character. Nor can it by any fair or reasonable construction be implied." *People v. New York, Lake Erie & Western Railroad*, 104 N. Y. 58, 66, 67.

In *Commonwealth v. Eastern Railroad*, the Supreme Judicial Court of Massachusetts, in holding that a railroad corporation, whose charter was subject to amendment, alteration, or repeal at the pleasure of the legislature, might be required by a subsequent statute to construct a station and stop its trains at a particular place on its road, said: "If the directors of a railroad were to find it for the interest of the stockholders to refuse to carry any freight or passengers except such as they might take at one end of the road and carry entirely through to the other end, and were to refuse to establish any way stations, or do any way business for that reason, though the road passed for a long distance through a populous part of the State, this would be a case manifestly requiring and authorizing legislative interference under the clause in question. And on the same ground, if they refuse to provide reasonable accommodation for the people of any smaller locality, the legislature may reasonably alter and modify the discretionary power which the charter confers upon the directors, so as to make the duty to provide the accommodation absolute. Whether a reasonable ground for interference is presented in any particular case is for the legislature to determine; and their determination on this point must be conclusive." 103 Mass. 254, 258.

Upon the same principle, the Supreme Judicial Court of Maine compelled a railroad corporation to build a station at a specified place on its road in accordance with an order of railroad commissioners, expressly empowered by the statutes of the State to make such an order, and to apply to the court to enforce it. *Maine Stat. 1871, c. 204; Railroad Commissioners v. Portland & Oxford Railroad*, 63 Me. 270.

In *Southeastern Railway v. Railway Commissioners*, a railway company was held, by Lord Chancellor Selborne, Lord Chief Jus-

tice Coleridge, and Lord Justice Brett, in the English Court of Appeal, to be under no obligation to establish stations at any particular place or places unless it thought fit to do so; and was held bound to afford improved facilities for receiving, forwarding, and delivering passengers and goods at a station once established and used for the purpose of traffic, only so far as it had been ordered to afford them by the railway commissioners within powers expressly conferred by act of Parliament. 6 Q. B. D. 586, 592.

The decision in *State v. Republican Valley Railroad*, 17 Neb. 647, cited in the opinion below, proceeded upon the theory (inconsistent with the judgments of this court in *Atchison, etc., Railroad v. Denver & New Orleans Railroad*, and of the Court of Appeals of New York in *People v. New York, etc., Railroad*, above stated) that, independently of any statute requirements, a railroad corporation might be compelled to establish a station and to stop its trains at any point on the line of its road at which the court thought it reasonable that it should.

The opinions of the Supreme Court of Illinois, though going farther than those of most other courts in favor of issuing writs of mandamus to railroad corporations, afford no countenance for granting the writ in the case at bar. In *People v. Louisville & Nashville Railroad*, 120 Illinois, 48, a mandamus was issued to compel the company to run all its passenger trains to a station which it had once located and used in a town made a terminal point by the charter and which was a county seat; because the corporation had no legal power to change its location, and was required by statute to stop all trains at a county seat. In *People v. Chicago & Alton Railroad*, 130 Illinois, 175, in which a mandamus was granted to compel a railroad company to establish and maintain a station in a certain town, the petition for the writ alleged specific facts making out a clear and strong case of public necessity, and also alleged that the accommodation of the public living in or near the town required, and long had required, the establishment of a station on the line of the road within the town; and the decision was that a demurrer to the petition admitted both the specific and the general allegations, and must therefore be overruled. The court, at pages 182, 183, of that case, and again in *Mobile & Ohio Railroad v. People*, 132 Ill. 559, 571, said: "It is undoubtedly the rule that railway companies, in the absence of statutory provisions limiting and restricting their powers, are vested with a very broad discretion in the matter of locating, constructing, and operating their railways, and of locating and maintaining their freight and passenger stations. This discretion, however, is not absolute, but is subject to the condition that it must be exercised in good faith, and with a due regard to the

necessities and convenience of the public." But in the latter case the court also said: "The company cannot be compelled, on the one hand, to locate stations at points where the cost of maintaining them will exceed the profits resulting therefrom to the company, nor allowed, on the other hand, to locate them so far apart as to practically deny to communities on the line of the road reasonable access to its use. The duty to maintain or continue stations must manifestly rest upon the same principle, and a company cannot, therefore, be compelled to maintain or continue a station at a point when the welfare of the company and the community in general requires that it should be changed to some other point." P. 570. "The rule has been so often announced by this court that it is unnecessary to cite the cases, that a mandamus will never be awarded unless the right to have the thing done which is sought is clearly established." P. 572. And upon these reasons the writ was refused.

Sec. 691 of the Code of Washington Territory of 1881, following the common law, defines the cases in which a writ of mandamus may issue, as "to any inferior court, corporation, board, officer, or person to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station." By the same code, in mandamus, as in civil actions, issues of fact may be tried by a jury; the verdict may be either general or special, and; if special, may be in answer to questions submitted by the court; and material allegations of the plaintiff not denied by the answer, as well as material allegations of new matter in the answer not denied in the replication, are deemed admitted, but a qualified admission cannot be availed of by the other party, except as qualified. §§ 103, 240, 242, 694, 696; *Bremer v. Burgess*, 2 Wash. Ter. 290, 296; *Gildersleeve v. Landon*, 73 N. Y. 609. The replication filed in this case, not being copied in the record sent up, may be assumed, as most favorable to the defendant in error, to have denied all allegations of new matter in the answer.

Fact
The leading facts of this case, then, as appearing by the special verdict, taken in connection with the admissions, express or implied, in the answer, are as follows: The defendant at one time stopped its trains at Yakima City, but never built a station there, and, after completing its road four miles farther to North Yakima, established a freight and passenger station at North Yakima, which was a town laid out by the defendant on its own unimproved land, and thereupon ceased to stop its trains at Yakima City. In consequence, apparently, of this, Yakima City, which at the time of filing the petition for mandamus was the most important town, in population and business, in the county, rapidly

dwindled, and most of its inhabitants removed to North Yakima, which at the time of the verdict had become the largest and most important town in the county. No other specific facts as to North Yakima are admitted by the parties or found by the jury. The defendant could build a station at Yakima City, but the cost of building one would be \$8000, and the expense of maintaining it \$150 a month, and the earnings of the whole of this division of the defendant's road are insufficient to pay its running expenses. The special verdict includes an express finding (which appears to us to be of pure matter of fact, inferred from various circumstances, some of which are evidently not specifically found, and to be in no sense, as assumed by the court below, a conclusion of law) that there are other stations for receiving freight and passengers between North Yakima and Pasco Junction, which furnish sufficient facilities for the country south of North Yakima, which must include Yakima City; as well as an equally explicit finding (which appears to have been wholly disregarded by the court below) that the passenger and freight traffic of the people living in the surrounding country, considering them as a community, would be better accommodated by a station at North Yakima than by one at Yakima City. It also appears of record that, after the verdict and before the District Court awarded the writ of mandamus, the county seat was removed, pursuant to an act of the territorial legislature, from Yakima City to North Yakima.

The mandamus prayed for being founded on a suggestion that the defendant had distinctly manifested an intention not to perform a definite duty to the public, required of it by law, the petition was rightly presented in the name of the Territory at the relation of its prosecuting attorney; *Attorney-General v. Boston*, 123 Mass. 460, 479; Code of Washington Territory, § 2171; and no demand upon the defendant was necessary before applying for the writ. *Commonwealth v. Allegheny Commissioners*, 37 Penn. St. 237; *State v. Board of Finance*, 9 Vroom, 259; *Mottu v. Primrose*, 23 Md. 482; *Attorney-General v. Boston*, 123 Mass. 460, 477.

But upon the facts found and admitted no sufficient case is made for a writ of mandamus, even if the court could under any circumstances issue such a writ for the purpose set forth in the petition. The fraudulent and wrongful intent, charged against the defendant in the petition, is denied in the answer, and is not found by the jury. The fact that the town of North Yakima was laid out by the defendant on its own land cannot impair the right of the inhabitants of that town, whenever they settled there, or of the people of the surrounding country, to reasonable access to the railroad. No ground is shown for requiring the defendant to maintain stations both at Yakima City and at North Yakima; there

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are other stations furnishing sufficient facilities for the whole country from North Yakima southward to Pasco Junction; the earnings of the division of the defendant's road between those points are insufficient to pay its running expenses; and to order the station to be removed from North Yakima to Yakima City would inconvenience a much larger part of the public than it would benefit, even at the time of the return of the verdict. And, before judgment in the District Court, the legislature, recognizing that the public interest required it, made North Yakima the county seat. The question whether a mandamus should issue to protect the interest of the public does not depend upon a state of facts existing when the petition was filed, if that state of facts has ceased to exist when the final judgment is rendered. In this regard, as observed by Lord Chief Justice Jervis in *Great Western Railway v. The Queen*, already cited, "there is a very great difference between an indictment for not fulfilling a public duty, and a mandamus commanding the party liable to fulfil it." 1 El. & Bl. 878. The court will never order a railroad station to be built or maintained contrary to the public interest. *Texas & Pacific Railway v. Marshall*, 136 U. S. 393.

For the reasons above stated, the judgment of the Supreme Court of the Territory must be reversed, and the case remanded, with directions to enter judgment for the defendant dismissing the petition; and Washington having been admitted into the Union as a State by act of Congress passed while this writ of error was pending in this court, the mandate will be directed, as the nature of the case requires, to the Supreme Court of the State of Washington. Act of February 22, 1889, c. 180, §§ 22, 23; 25 Stat. 682, 683.

Judgment reversed, and mandate accordingly.

BREWER, J., with whom concurred FIELD and HARLAN, JJ., dissenting.

I dissent from the opinion and judgment in this case.

The question is not whether a railroad company can be compelled to build a depot and stop its trains at any place where are gathered two or three homes and families; nor whether courts can determine at what locality in a city or town the depot shall be placed; nor even whether, when there are two villages contiguous, the courts may determine at which of the two the company shall make its stopping place, or compel depots at both. But the case here presented is this: A railroad company builds its road into a county, finds the county seat already established and inhabited, the largest and most prosperous town in the county, and along the line of its road for many miles. It builds its road to and through that county seat; there is no reason of a public nature

why that should not be made a stopping place. For some reason, undisclosed, perhaps because that county seat will not pay to the managers a bonus, or because they seek a real estate speculation in establishing a new town, it locates its depot on the site of a "paper" town the title to which it holds, contiguous to this established county seat; stops only at the one, and refuses to stop at the other, and thus, for private interests, builds up a new place at the expense of the old; and for this subservience of its public duty to its private interests, we are told that there is in the courts no redress; and this because Congress in chartering this Northern Pacific road did not name Yakima City as a stopping place, and has not in terms delegated to the courts the power to interfere in the matter.

A railroad corporation has a public duty to perform, as well as a private interest to subserve, and I never before believed that the courts would permit it to abandon the one to promote the other. Nowhere in its charter is in terms expressed the duty of carrying passengers and freight. Are the courts impotent to compel the performance of this duty? Is the duty of carrying passengers and freight any more of a public duty than that of placing its depots and stopping its trains at those places which will best accommodate the public? If the State of Indiana incorporates a railroad to build a road from New Albany through Indianapolis to South Bend, and that road is built, can it be that the courts may compel the road to receive passengers and transport freight, but in the absence of a specific direction from the legislature, are powerless to compel the road to stop its trains and build a depot at Indianapolis? I do not so belittle the power or duty of the courts.

SECTION II. (CONTINUED).—LEGISLATIVE CONTROL.

(b) *Over foreign corporations.*

DOYLE v. CONTINENTAL INSURANCE CO.

IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM,
1876.

[Reported in 94 United States Reports 535.]

APPEAL from the Circuit Court of the United States for the Western District of Wisconsin.

The bill of complaint alleges that the complainant, the Continental Insurance Company of the city of New York, is a corporation organized and existing under the laws of the State of Connecticut, and a citizen of that State.

That prior to the passage of the act of the legislature of the State of Wisconsin, entitled "An Act to provide for the incorporation and government of fire and inland navigation insurance companies," approved March 4, 1870, the complainant had established agencies, opened offices, and made considerable expenditures of money in advertising the business of insurance against loss by fire in the State of Wisconsin. That soon after the passage of said act complainant complied with the provisions of sec. 22 thereof, and procured from the State Treasurer and Secretary of State the certificates and license to do business in said State as therein provided, and did subsequently fully comply with said act; but that, upon filing appointment of an agent upon whom process of law could be served, complainant was compelled to add an agreement, on its part, not to remove into the Federal courts suits brought against it in the State courts, which agreement to that effect was made. That after the decision of this court in *Insurance Co. v. Paige*, 20 Wall. 445, the complainant removed a suit brought on one of its policies against it in the State court, into the Federal court. That because of such removal a demand was made upon the defendant, Peter Doyle, as Secretary of State, to revoke the certificate or license authorizing the complainant to do business in said State of Wisconsin.

That complainant had a large number of agencies in the State engaged in the conduct of its business, and a revocation of its license would work great and irreparable injury to the complainant in its business in said State, and the complainant feared that said defendant would revoke said license, unless restrained by injunction. A temporary injunction was issued restraining the defendant from revoking the license of the complainant, because of the removal of said suit from the State to the Federal court.

A demurrer to the bill was overruled, and a decree entered making the injunction perpetual. From this decree the defendant appealed.

Sec. 22, c. 56, Laws of Wisconsin, 1870, provides as follows:

"That any fire insurance company, association, or partnership, incorporated by or organized under the laws of any other State of the United States, desiring to transact any such business as aforesaid, by any agent or agents, in this State, shall first appoint an attorney in this State, on whom process of law can be served, containing an agreement that such company will not remove the suit for trial in the United States Circuit or Federal courts, and file in the office of the Secretary of State a written instrument, duly signed and sealed, certifying such appointment, which shall continue until another attorney be substituted."

Secs. 1 and 3, c. 64, are in the following words:

"Sec. 1. If any insurance company or association shall make application to change the *venue*, or remove any suit or action heretofore commenced, or which shall be hereafter commenced, in any court of the State of Wisconsin, to the United States Circuit or District Court, or to the Federal court, contrary to the provisions of any law of the State of Wisconsin, or contrary to any agreement it has made and filed, or may make and file, as provided and required by section number twenty-two of chapter fifty-six of the General Laws of Wisconsin for the year A. D. 1870, or any provision of law now in force in said State, or may hereafter be enacted therein, it shall be the imperative duty of the Secretary of State, or other proper State officer, to revoke and recall any authority or license to such company to do and transact any business in the State of Wisconsin, and no renewal or new license or certificate shall be granted to such company for three years after such revocation, and such company shall thereafter be prohibited from transacting any business in the State of Wisconsin until again duly licensed."

act.

"Sec. 3. If any insurance company or association shall make application to remove any case from the State court into the United States Circuit or District Court or Federal court, contrary to the provisions of chapter fifty-six of the General Laws of Wisconsin for the year A. D. 1870, or any other State law, or contrary to any agreement which such company may have filed in pursuance of said chapter fifty-six of the General Laws of Wisconsin for the year A. D. 1870, or any other law of the State of Wisconsin, it shall be liable, in addition, to a penalty of not less than \$100 or more than \$500 for each application so made, or for each offense so committed for making such application, the same to be recovered by suit in the name of the State of Wisconsin, and it shall be the imperative duty of the Attorney-General of the State of Wisconsin to see and attend that all of the provisions of said chapter fifty-six of the General Laws of 1870, and the provisions of this act are duly enforced."

George B. Smith for the appellant.

William Allen Butler, B. J. Stevens, and I. C. Sloan for the appellee.

HUNT, J., delivered the opinion of the court.

The case of *Insurance Co. v. Morse*, 20 Wall. 445, is the basis of the bill of complaint in the present suit. We have carefully reviewed our decision in that case, and are satisfied with it. In that case, an agreement not to remove any suit brought against it in the State courts of Wisconsin into the Federal courts had been made by the company, in compliance with the Wisconsin statute of 1870. The company, nevertheless, did take all the steps re-

quired by the United States statute of 1789 to remove its suit with Morse from the State court into the Federal courts. Disregarding that action, the Supreme Court of Wisconsin allowed the action in the State court to proceed to judgment against the company, as if no transfer had been made. When the judgment thus obtained was brought into this court we held it to be illegally obtained, and reversed it. It was held, first, upon the general principles of law, that although an individual may lawfully omit to exercise his right to transfer a particular case from the State courts to the Federal courts, and may do this as often as he thinks fit in each recurring case, he cannot bind himself in advance by an agreement which may be specifically enforced thus to forfeit his rights. This was upon the principle that every man is entitled to resort to all the courts of the country, to invoke the protection which all the laws and all the courts may afford him, and that he cannot barter away his life, his freedom, or his constitutional rights.

As to the effect of the statutory requirement of the agreement, the opinion, at page 458 of the case as reported, is in these words:

"On this branch of the case the conclusion is this:

"1. The Constitution of the United States secures to citizens of another State than that in which suit is brought an absolute right to remove their cases into the Federal court, upon compliance with the terms of the act of 1789.

"2. The statute of Wisconsin is an obstruction to this right, is repugnant to the Constitution of the United States and the laws in pursuance thereof, and is illegal and void.

"3. The agreement of the insurance company derives no support from an unconstitutional statute, and is void, as it would be had no such statute been passed."

The opinion of a court must always be read in connection with the facts upon which it is based. Thus, the second conclusion above recited, that the statute of Wisconsin is repugnant to the Constitution of the United States and is illegal and void, must be understood as spoken of the provision of the statute under review—to wit, that portion thereof requiring a stipulation not to transfer causes to the courts of the United States. The decision was upon that portion of the statute only, and other portions thereof, when they are presented, must be judged of upon their merits.

We have not decided that the State of Wisconsin had not the power to impose terms and conditions as preliminary to the right of an insurance company to appoint agents, keep offices, and issue policies in that State. On the contrary, the case of *Paul v. Virginia*, 8 Wall. 168, where it is held that such conditions may be

agreed

imposed, was cited with approval in *Insurance Co. v. Morse*. That case arose upon a statute of Virginia, providing that no foreign insurance company should transact business within that State until it had taken out a license, and had made a deposit with the State Treasurer of bonds varying in amount from \$30,000 to \$50,000, according to the amount of its capital. This court sustained the power of the legislature to impose such conditions, and sustained the judgment of the State court, convicting Paul upon an indictment for violating the State law, in issuing policies without having first complied with the conditions required.

Ducat v. Chicago, 10 Wall. 410, decided that the statute of the State of Illinois, requiring a license to be taken out by foreign insurance companies, for which six dollars each should be paid, and the filing of an appointment of an attorney, with power to accept service of process, was a legal condition; and a requirement, that, when such company was located in the city of Chicago, it should also pay to the treasurer of that city two dollars upon the one hundred dollars upon the amount of all premiums received, was held to be legal.

In *Lafayette Insurance Co. v. French*, 18 How. 404, the court say:

"A corporation created by Indiana can transact business in Ohio only with the consent, express or implied, of the latter State. 13 Pet. 519. This consent may be accompanied by such conditions as Ohio may think fit to impose; and these conditions must be deemed valid and effectual by other States and by this court, provided they are not repugnant to the Constitution or laws of the United States, or inconsistent with those rules of public law which secure the jurisdiction and authority of each State from encroachment by all others, or that principle of natural justice which forbids condemnation without opportunity for defense."

Neither did *Insurance Co. v. Morse*, *supra*, undertake to decide what are the powers of the State of Wisconsin, in revoking a license previously granted to an insurance company, for what causes or upon what grounds its action in that respect may be based. No such question arose upon the facts, or was argued by counsel or referred to in the opinion of the court.

The case now before us does present that point, and with distinctness.

The complainant alleges that a license had been granted to the Continental Insurance Co., upon its executing an agreement that it would not remove any suit against it from the tribunal of the State to the Federal courts; that in the case of *Drake* it did, on the 10th day of March, 1875, transfer his suit from the Winnebago circuit of the State to the Circuit Court of the United States; that

Drake thereupon demanded that the defendant, who is Secretary of State of Wisconsin, should revoke and annul its license, in accordance with the provisions of the act of 1872; that it is insisted that he has power to do so summarily, without notice or trial; that the complainant is fearful that he will do so, and that it will be done simply and only for the reason that the complainant transferred to the Federal court the case of Drake, as above set forth.

The cases of *Bank of Augusta v. Earle*, *Ducat v. Chicago*, *Paul v. Virginia*, and *Lafayette Insurance Co. v. French*, establish the principle that a State may impose upon a foreign corporation, as a condition of coming into or doing business within its territory, any terms, conditions, and restrictions it may think proper, that are not repugnant to the Constitution or laws of the United States. The point is elaborated at great length by Taney, Ch. J., in the case first named, and by Field, J., in the case last named.

The correlative power to revoke or recall a permission is a necessary consequence of the main power. A mere license by a State is always revocable. *Rector v. Philadelphia*, 24 How. 300; *People v. Roper*, 55 N. Y. 629; *People v. Commissioners*, 47 N. Y. 50. The power to revoke can only be restrained, if at all, by an explicit contract upon good consideration to that effect. *Humphrey v. Pegues*, 16 Wall. 244; *Tomlinson v. Jessup*, 15 *id.* 454.

A license to a foreign corporation to enter a State does not involve a permanent right to remain, subject to the laws and Constitution of the United States. Full power and control over its territories, its citizens, and its business belong to the State.

If the State has the power to do an act, its intention or the reason by which it is influenced in doing it cannot be inquired into. Thus, the pleading before us alleges that the permission of the Continental Insurance Co. to transact its business in Wisconsin is about to be revoked, for the reason that it removed the case of Drake from the State to the Federal courts.

If the act of an individual is within the terms of the law, whatever may be the reason which governs him, or whatever may be the result, it cannot be impeached. The acts of a State are subject to still less inquiry, either as to the act itself or as to the reason for it. The State of Wisconsin, except so far as its connection with the Constitution and laws of the United States alters its position, is a sovereign State, possessing all the powers of the most absolute government in the world.

The argument that the revocation in question is made for an unconstitutional reason cannot be sustained. The suggestion confounds an act with an emotion or a mental proceeding, which is not the subject of inquiry in determining the validity of a statute. An unconstitutional reason or intention is an impracticable sugges-

tion, which cannot be applied to the affairs of life. If the act done by the State is legal, is not in violation of the Constitution or laws of the United States, it is quite out of the power of any court to inquire what was the intention of those who enacted the law.

In all the cases where the litigation of a State has been declared void, such legislation has been based upon an act or a fact which was itself illegal. Thus, in *Crandall v. Nevada*, 6 Wall. 35, a tax was imposed and collected upon passengers in railroad and stage companies.

In *Almy v. State of California*, 24 How. 169, a stamp duty was imposed by the legislature upon bills of lading, for gold or silver transported from that State to any port or place out of the State.

In *Brown v. The State of Maryland*, 12 Wheat. 419, a license, at an expense of \$50, was required before an importer of goods could sell the same by the bale, package, or barrel.

In *Henderson v. Mayor of New York*, 92 U. S. 265, the statute required the master to give a bond of \$300 for each passenger, conditioned that he should not become a public charge within four years, or to pay the sum of \$1.50.

In the *Passengers' Case*, 7 How. 572, the requirement was of a like character.

In all these cases, it was the act or fact complained of that was the subject of judicial injury, and upon the act was the judgment pronounced.

The statute of Wisconsin declares that if a foreign insurance company shall remove any case from its State court into the Federal courts, contrary to the provisions of the act of 1870, it shall be the duty of the Secretary of State immediately to cancel its license to do business within the State. If the State has the power to cancel the license, it has the power to judge of the cases in which the cancellation shall be made. It has the power to determine for what causes and in what manner the revocation shall be made. *dec*

It is said that we thus indirectly sanction what we condemn when presented directly; to wit, that we enable the State of Wisconsin to enforce an agreement to abstain from the Federal courts. This is an "inexact statement."// The effect of our decision in this respect is that the State may compel the foreign company to abstain from the Federal courts, or to cease to do business in the State. It gives the company the option. This is justifiable, because the complainant has no constitutional right to do business in that State; that State has authority at any time to declare that it shall not transact business there. This is the whole point of the case, and, without reference to the injustice, the prejudice, or the wrong that is alleged to exist, must determine the question.// No right of the complainant under the laws or Constitution of the *dec*

United States, by its exclusion from the State, is infringed; and this is what the State now accomplishes. There is nothing, therefore, that will justify the interference of this court.

Decree reversed, and cause remanded with instructions to dismiss the bill.¹

PHILADELPHIA FIRE ASSOCIATION v. NEW YORK.

IN THE SUPREME COURT OF THE UNITED STATES, NOVEMBER 15,
1886.

[*Reported in 119 United States Reports 110.*]

THIS was a writ of error to the Supreme Court of the State of New York. Under the provisions of sec. 1279 of the Code of Civil Procedure of New York, the People of the State of New York and the Fire Association of Philadelphia, a Pennsylvania corporation, being parties to a question in difference which might be the subject of an action, agreed upon a case containing a statement of the facts on which the controversy depended, and presented a written submission of it to the Supreme Court of New York, so that the controversy became an action. The material facts set forth in the case were these:

“The defendant, The Fire Association of Philadelphia, is a corporation created and organized in the year 1820, by and under the laws of the State of Pennsylvania, for the transaction of the business of fire insurance, and having its principal place of business in the city of Philadelphia. In the year 1872 it established an agency in the State of New York, which it has ever since maintained. No question is here raised but that it has uniformly complied with all the requirements and conditions imposed by the laws of this State upon fire insurance companies from other States establishing and maintaining agencies in this State, except the payment of the tax now in dispute, upon premiums received by it in 1881 upon risks located within the State of New York, and which is the subject of this controversy, and has received from year to year certificates of authority from the superintendent of the insurance department of this State, as provided to be issued under the act, c. 466 of the Laws of 1853, and the subsequent acts amendatory thereof.

“The Act of the People of the State of New York, passed May 11, 1865, three-fifths being present, being c. 694 of the Laws of

¹The dissenting opinion of Bradley, J., in which Swayne and Miller, JJ., concurred, has been omitted.—ED.

1865, entitled 'An Act in relation to the deposits required to be made, and the taxes, fines, fees, and other charges payable by insurance companies of sister States,' as amended by the act of 1875, c. 60, provides as follows, viz.: 'Whenever the existing or future laws of any other State of the United States shall require of insurance companies, incorporated by or organized under the laws of this State, and having agencies in such other States, or of the agents thereof, any deposit of securities in such State for the protection of policy-holders or otherwise, or any payment for taxes, fines, penalties, certificates of authority, license fees, or otherwise, greater than the amount required for such purposes from similar companies of other States by the then existing laws of this State, then, and in every such case, all companies of such States establishing, or having heretofore established, an agency or agencies in the State, shall be and are hereby required to make the same deposit for a like purpose in the insurance department of the State, and to pay the superintendent of said department for taxes, fines, penalties, certificates of authority, license fees, and otherwise, an amount equal to the amount of such charges and payments imposed by the laws of such State upon the companies of this State and the agents thereof; and the superintendent of the insurance department is hereby authorized to remit any of the fees and charges which he is required to collect by existing laws, except such as he is required to collect under and by virtue of this act, provided, however, that no discrimination shall be made in favor of one company over any other from the same State.'

"The State of Pennsylvania, by an act passed April 4, 1873, and ever since in force, enacted as follows, viz.: 'Sec. 10. No person shall act as agent or solicitor in this State of any insurance company of another State, or foreign government, in any manner whatever relating to risks, until the provisions of this act have been complied with on the part of the company or association, and there has been granted to said company or association, by the commissioner, a certificate of authority, showing that the company or association is authorized to transact business in this State; and it shall be the duty of every such company or association, authorized to transact business in this State, to make report to the commissioner in the month of January of each year, under oath of the president or secretary thereof, showing the entire amount of premiums of every character and description received by said company or association in this State, during the year or fraction of a year ending with the 31st day of December preceding, whether said premiums were received in money or in the form of notes, credits, or any other substitute for money, and pay into the

State treasury a tax of three per centum upon said premiums; and the commissioner shall not have power to grant a renewal of the certificate of said company or association until the tax aforesaid is paid into the State treasury.'

"In the year 1881 the defendant, through its authorized agents in the State of New York, received for insurance against loss or injury by fire, upon property located within the State of New York, premiums to the aggregate amount of \$196,170.22. The superintendent of the insurance department of New York claimed that the defendant ought to pay, as a tax, for the year 1881, \$1848.45, with proper interest, being the amount arrived at by deducting from \$5885.10 (which would be a tax of three per cent. on \$196,170.22) the sum of \$4036.65, which the defendant, as a Pennsylvania corporation, had paid as a tax on premiums, during 1881, under laws of New York in force in 1881 other than the act of 1865, as amended by the act of 1875. The case then states that 'the controversy between the parties is, as to whether the defendant is liable to pay any tax to the superintendent of the insurance department of the State, upon the said premiums received by it in the year 1881, and, if any, what amount;' that 'the defendant claims that it is not liable to the plaintiffs for any amount, insisting, first, that the said act of 1865, as amended by the act of 1875, is unconstitutional and void, and not a legitimate exercise of legislative power,' and making further claims as to the amount due from it if the act in question is valid; that 'the question submitted to the court for decision upon the foregoing statement of facts is, whether the defendant is liable to pay to the plaintiffs, or to the superintendent, the whole, or any, and, if any, what part of the \$1848.45; and that judgment is to be entered according to its decision."

The agreed case having been heard by the Supreme Court in General Term, as required by law, it rendered a judgment to the effect that the defendant was not liable to pay any part of such amount claimed by the superintendent. Two of the three judges holding the court concurred in that judgment. The third dissented. The opinions of the majority and minority accompany the record. The majority held that the statutes of New York in question were void because in conflict with the Constitution of New York, and did not discuss any question arising under the Constitution of the United States. The dissenting judge differed with the majority as to the question adjudged by them, and further said: "Nor can I agree with the claim that this statute is contrary to the Fourteenth Amendment to the Constitution of the United States."

The plaintiffs having appealed to the Court of Appeals of New

York, that court reversed the judgment of the Supreme Court, and rendered judgment for the plaintiffs for \$1848.45, with interest and costs, and remitted the record to the Supreme Court, where a judgment to that effect was entered, to review which the defendant brought a writ of error. The Court of Appeals, in its decision, 92 New York, 311, after overruling the view taken by the majority of the judges of the Supreme Court as to the validity of the statute under the Constitution of New York, proceeded to consider its constitutionality under that clause of the Fourteenth Amendment to the Federal Constitution which commands that no State shall "deny to any person within its jurisdiction the equal protection of the laws." It held that that clause had no application to the rights of the defendant, because, being a foreign corporation, it was not within the jurisdiction of New York until it was admitted by the State, upon a compliance with the conditions of admission which the State imposed and had the right to impose.

Joseph H. Choate for plaintiff in error.

BLATCHFORD, J., after stating the case as above reported, delivered the opinion of the court.

The defendant claims here the benefit of the Fourteenth Amendment, and a question has occurred as to whether the record presents that point for our review.¹

The provision of the Fourteenth Amendment, which went into effect in July, 1868, is, that no State shall "deny to any person within its jurisdiction the equal protection of the laws." The first question which arises is, whether this corporation was a person within the jurisdiction of the State of New York, with reference to the subject of controversy and within the meaning of the Amendment. *Defence 111*

The defendant, on the assumption that if it was within the jurisdiction of the State of New York, it was, though a foreign corporation, "a person," and so entitled to the benefit of the Amendment, contends that it was within such jurisdiction. The argument is, that it established an agency within the State in 1872, which it had ever since maintained; that it complied, from year to year, with all the requirements and conditions imposed by the laws of the State on foreign fire insurance companies doing business in the State; that it received from year to year certificates of authority from the superintendent of the insurance department, as provided by statute; that, under those circumstances, it was legally within the State and within its jurisdiction; that, being in the State, by permission of the State, continuously from 1872 to 1882,

¹So much of the opinion as relates to this question has been omitted.—
Ed.

the State imposed on it, while there, in 1882, an unequal and unlawful burden; and that the New York act of 1865 did not come into effect as to Pennsylvania corporations until the Pennsylvania act of 1873 was passed, at which time the defendant had already been a year in the State.

But we are unable to take that view of the case. In *Paul v. Virginia*, 8 Wall. 168, at December Term, 1868, a statute of Virginia required that every insurance company not incorporated by Virginia should, as a condition of carrying on business in Virginia, deposit securities with the State Treasurer, and afterward obtain a license; and another statute made it a penal offense for a person to act in Virginia as agent for an insurance company not incorporated by Virginia, without such license. A person having acted as such agent without a license, and been convicted and fined under the statute, this court held that there had been no violation of that clause of art. 4, sec. 2, of the Constitution of the United States which provides that "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States;" nor any violation of the clause in art. 1, sec. 8, giving power to Congress "to regulate commerce with foreign nations and among the several States." The view announced was, that corporations are not citizens within the clause first cited, on the ground that the privileges and immunities secured to the citizens of each State in the several States are those which are common to the citizens of the latter States under their Constitutions and laws, by virtue of their being citizens; and that as a corporation created by a State is a mere creation of local law, even the recognition of its existence by other States, and the enforcement of its contracts made therein, depend purely on the comity of those States—a comity which is never extended where the existence of the corporation or the exercise of its powers is "prejudicial to their interests or repugnant to their policy." And the court, speaking by Field, J., said: "Having no absolute right of recognition in other States, but depending for such recognition and the enforcement of its contracts upon their assent, it follows, as a matter of course, that such assent may be granted upon such terms and conditions as those States may think proper to impose. They may exclude the foreign corporation entirely, they may restrict its business to particular localities, or they may exact such security for the performance of its contracts with their citizens as in their judgment will best promote the public interest. The whole matter rests in their discretion." As to the power of Congress to regulate commerce among the several States, the court said, that while the power conferred included commerce carried on by corporations as well as that carried on by individuals, "issuing

a policy of insurance is not a transaction of commerce." This decision only followed the principles laid down in the earlier cases of *Bank of Augusta v. Earle*, 13 Pet. 519, 588, and *Lafayette Ins. Co. v. French*, 18 How. 404.

The same rulings were followed in *Ducat v. Chicago*, 10 Wall. 410, where it was said that the power of a State to discriminate between her own corporations and those of other States desirous of transacting business within her jurisdiction being clearly established, it belonged to the State to determine as to the nature or degree of discrimination, "subject only to such limitations on her sovereignty as may be found in the fundamental law of the Union."

Other cases to the same effect are *Liverpool Ins. Co. v. Massachusetts*, 10 Wall. 566; *Doyle v. Continental Ins. Co.*, 94 U. S. 535; and *Cooper Mfg. Co. v. Ferguson*, 113 U. S. 727.

As early as 1853, the State of New York, by a statute, c. 466, required of every fire insurance company incorporated by any other State or any foreign government, as a prerequisite to doing business in the State, that it should file an appointment of an attorney on whom process was to be served, and a statement of its pecuniary condition, and procure from a designated public officer a certificate of authority stating that the company had complied with all the requisitions of the statute; and also required the renewal from year to year of the statement and evidence of investments; and provided that such public officer, on being satisfied that the capital of the company and its securities and investments remained secure, should furnish a renewal of the certificate of authority. A violation of the provisions was made a penal offense. This act, with immaterial amendments, is still in force.

This Pennsylvania corporation came into the State of New York to do business by the consent of the State, under this act of 1853, with a license granted for a year, and has received such license annually, to run for a year. It is within the State for any given year under such license, and subject to the conditions prescribed by statute. The State, having the power to exclude entirely, has the power to change the conditions of admission at any time, for the future, and to impose as a condition the payment of a new tax, or a further tax, as a license fee. If it imposes such license fee as a prerequisite for the future, the foreign corporation, until it pays such license fee, is not admitted within the State or within its jurisdiction. It is outside, at the threshold, seeking admission, with consent not yet given. The act of 1865 had been passed when the corporation first established an agency in the State. The amendment of 1875 changed the act of 1865 only by giving to the superintendent the power of remitting the fees and charges re-

quired to be collected by then existing laws. Therefore, the corporation was at all times, after 1872, subject, as a prerequisite to its power to do business in New York, to the same license fee its own State might thereafter impose on New York companies doing business in Pennsylvania. By going into the State of New York in 1872, it assented to such prerequisite as a condition of its admission within the jurisdiction of New York. It could not be of right within such jurisdiction, until it should receive the consent of the State to its entrance therein under the new provisions, and such consent could not be given until the tax, as a license fee for the future, should be paid.

It is not to be implied, from anything we have said, that the power of a State to exclude a foreign corporation from doing business within its limits is to be regarded as extending to an interference with the transaction of commerce between that State and other States by a corporation created by one of such other States.

Judgment affirmed.¹

ASHLEY v. RYAN.

IN THE SUPREME COURT OF THE UNITED STATES, MAY 14, 1894.

[*Reported in 153 United States Reports 436.*]

THE Wabash, St. Louis & Pacific Railroad Co., which owned and operated lines running through the States of Ohio, Indiana, Illinois, Missouri, and Michigan, having defaulted in the payment of interest on its bonds, foreclosure proceedings were commenced in the Federal courts for the sale of its property. Subsequently a committee was entrusted with the duty of buying in the property. After purchase by the committee the property in the several States was transferred to companies incorporated in those States. The following were the companies thus organized, and to whom the necessary transfers were respectively made:

In Ohio: The Toledo & Western; capital stock, \$700,000.

In Michigan: The Detroit & State Line Wabash; capital stock, \$300,000.

In Indiana: The Wabash Eastern, of Indiana; capital stock, \$9,000,000.

In Illinois: The Wabash Eastern, of Illinois; capital stock, \$12,000,000.

In Missouri: The Wabash Western; capital stock, \$30,000,000.

¹The dissenting opinion of Harlan, J., has been omitted.—Ed.

Thereafter these several companies were consolidated into one. Sec. 148a of the Revised Statutes of Ohio contains, among other provisions, the following:

"The Secretary of State shall hereafter charge and collect the following fees for official services:

"1. For filing the articles of incorporation of any corporation whose capital stock is ten thousand dollars or under, ten dollars; of a corporation whose capital stock is over ten thousand dollars, one-tenth of one per cent. upon the authorized capital stock of such corporation.

"2. For filing a certificate of increase of the capital stock of any corporation having a capital stock where the amount of the increase is ten thousand dollars or under, ten dollars; where the amount of increase is over ten thousand dollars, one-tenth of one per cent. upon the proposed amount of increased capital.

"3. For filing articles of agreements of consolidation of corporations having a capital stock, the following fees shall be collected by the Secretary of State: Said articles or agreements of consolidation shall be treated as the articles of incorporation of the new consolidated corporations created by such articles or agreements of consolidation, and the fees for filing such articles or agreements of consolidation shall be the same in each case as is hereinbefore set forth for the filing of articles of incorporation of a corporation having the same amount of capital stock, as is provided for by the articles or agreements of consolidation for the new consolidated corporation, created by any such articles or agreement of consolidation; and in fixing the amount of such fees, no credit shall be allowed for fees previously paid by any of the constituent corporations, parties to such consolidation, but the same shall be determined solely by the amount of capital stock of the new corporation created by such articles or agreements of consolidation."

art.

By another provision of the Revised Statutes of Ohio, the fees to be collected under the foregoing law were required to be paid by the Secretary of State into the Treasury.

The plaintiffs in error presented their articles of consolidation, for filing, to the Secretary of State, and tendered \$700, that being one-tenth of one per cent. on the capital stock of the Toledo & Western Railroad, the only Ohio corporation which had entered into the consolidation. The Secretary refused to file the proffered articles for that amount, and demanded \$52,000, or one-tenth of one per cent. of the par value of the entire stock of the consolidated corporation. This amount was paid under protest, and suit was at once brought to recover all the excess paid over and above the \$700 originally tendered, upon the ground that such

excess had been collected without warrant of law; that it constituted a tax for the general purposes of revenue, and, therefore, its exaction was contrary to the Constitution and laws of the State of Ohio; and, moreover, that its enforcement would violate the Constitution of the United States, because it would be an attempt on the part of the State of Ohio to lay a burden on interstate commerce, or the instruments of such commerce, and to give an extra-territorial force to its taxing power.

Pending the controversy, an injunction issued restraining the Secretary of State from covering into the State treasury the sum which had been paid him under protest. The cause was ultimately taken to the Supreme Court of the State of Ohio, and by that court the judgment which maintained the validity of the charge was affirmed. The plaintiffs in error thereupon brought the cause here for review.

Henry Crawford for plaintiffs in error submitted on his brief.

J. K. Richards, Attorney-General of the State of Ohio, for defendant in error.

WHITE, J., after stating the case, delivered the opinion of the court.

With the question whether the sum paid was authorized by the Ohio statutes, or constituted a fee, a license, or a tax, under the Ohio laws and Constitution, we are not concerned. The writ of error brings before us only the Federal question. *Watson v. Mercer*, 8 Pet. 88; *Barbier v. Connolly*, 113 U. S. 27. Nor does the determination of the Federal question render it necessary to define the nature of the charge imposed; for, whether this charge be viewed as a tax, a license, or a fee, if its exaction violated the interstate commerce clause of the Constitution of the United States, or involved the assertion of the right of a State to exercise its powers of taxation beyond its geographical limits, it was void, whatever might be the technical character affixed to the exaction.

The purpose of the tender of the articles of consolidation to the Secretary of State was to secure to the consolidated company certain powers, immunities, and privileges which appertain to a corporation under the laws of Ohio. The rights thus sought could only be acquired by the grant of the State of Ohio, and depended for their existence upon the provisions of its laws. Without that State's consent they could not have been procured. Revised Statutes of Ohio, secs. 3239, 3382, and 3384b, amended by act of April 11, 1890, 87 Ohio Laws, 183, 184. Hence, in seeking to file its articles of incorporation, the company was applying for privileges, immunities, and powers which it could by no means possess, save by the grace and favor of the Constitution of the State of Ohio and the statutory provisions passed in accordance

4 grounds of defense

1)

2)

therewith. At the time the articles were presented for filing, the statute law of the State charged the parties with notice that the benefits which it was sought to procure could not be obtained without payment of the sum which the Secretary of State exacted. // As it was within the discretion of the State to withhold or grant the privilege of exercising corporate existence, it was, as a necessary resultant, also within its power to impose whatever conditions it might deem fit as prerequisite to corporate life. The act of filing, constituting, as it did, a claim of a right to the franchise granted by the State law, carried with it a voluntary assumption of any burden with which the privilege was accompanied, and without which the right of corporate existence could not have been procured. We say *voluntary* assumption, because, as the claim to the franchise was voluntary, the assumption of the privilege which resulted from it partook necessarily of the nature of the claim for corporate existence. Having thus accepted the act of grace of the State and taken the advantages which sprang from it, the company cannot be permitted to hold on to the privilege or right granted, and at the same time repudiate the condition by the performance of which it could alone obtain the privilege which it sought. *du,*

That the right to be a State corporation depends solely upon the grace of the State, and is not a right inherent in the parties is settled. Thus, in *California v. Pacific Railroad Co.*, 127 U. S. 1, 40, speaking through Bradley, J., the court said: "A franchise is a right, privilege, or power of public concern, which ought not to be exercised by private individuals at their mere will and pleasure, but should be reserved for public control and administration. . . . Under our system, their existence and disposal are under the control of the legislative department of the Government, and they cannot be assumed or exercised without legislative authority. . . . No private person can take another's property, even for public use, without such authority; which is the same as to say, that the right of eminent domain can only be exercised by virtue of a legislative grant. This is a franchise. No persons can make themselves a body corporate and politic without legislative authority. Corporate capacity is a franchise. The list might be continued indefinitely."

In *Home Insurance Co. v. New York*, 134 U. S. 594, 599, through Field, J., we said: "The right or privilege to be a corporation, or to do business as such body, is one generally deemed of value to the corporators, or it would not be sought in such numbers as at present. It is a right or privilege by which several individuals may unite themselves under a common name, and act as a single person with a succession of members, without dissolu-

tion or suspension of business and with a limited individual liability. The granting of such right or privilege rests entirely in the discretion of the State."

These citations only reiterate principles established beyond controversy by a series of decisions. *Bank of Augusta v. Earle*, 13 Pet. 519; *Lafayette Insurance Co. v. French*, 18 How. 404; *Paul v. Virginia*, 8 Wall. 168; *Ducat v. Chicago*, 10 Wall. 410.

Nor is the question at issue affected by the fact that some of the constituent elements which entered into the consolidated company were corporations owning and operating property in another State. The power of corporations of other States to become corporations, or to constitute themselves a consolidated corporation under the Ohio statutes, and thus avail of the rights given thereby, is as completely dependent on the will of that State as is the power of its individual citizens to become a corporate body, or the power of corporations of its own creation to consolidate under its laws. *Bank of Augusta v. Earle*, *supra*; *Lafayette Insurance Co. v. French*, *supra*; *Paul v. Virginia*, 8 Wall. 168, 181.

In the latter case, speaking through Field, J., we observed: "Now a grant of a corporate existence is a grant of special privileges to the corporators, enabling them to act for certain designated purposes as a single individual, and exempting them (unless otherwise specially provided) from individual liability. The corporation, being the mere creation of local law, can have no legal existence beyond the limits of the sovereignty where created. As said by this court in *Bank of Augusta v. Earle*, 'It must dwell in the place of its creation, and cannot migrate to another sovereignty.' The recognition of its existence, even, by other States, and the enforcement of its contracts made therein depend purely upon the comity of these States—a comity which is never extended where the existence of the corporation or the exercise of its powers are prejudicial to their interests or repugnant to their policy. . . . At the present day corporations are multiplied to an almost indefinite extent. There is scarcely a business pursued requiring the expenditure of large capital, or the union of large numbers, that is not carried on by corporations. It is not too much to say that the wealth and business of the country are to a great extent controlled by them. And if, when composed of citizens of one State, their corporate powers and franchises could be exercised in other States without restriction, it is easy to see that, with the advantages thus possessed, the most important business of those States would soon pass into their hands. The principal business of every State would, in fact, be controlled by corporations created by other States."

It follows from these principles that a State, in granting a cor-

porate privilege to its own citizens, or, what is equivalent thereto, in permitting a foreign corporation to become one of the constituent elements of a consolidated corporation organized under its laws, may impose such conditions as it deems proper, and that the acceptance of the franchise in either case implies a submission to the conditions without which the franchise could not have been obtained. In *Paul v. Virginia*, *supra*, the court said, p. 181: "Having no absolute right of recognition in other States, but depending for such recognition and the enforcement of its contracts upon their assent, it follows, as a matter of course, that such assent may be granted upon such terms and conditions as those States may think proper to impose. They may exclude the foreign corporation entirely; they may restrict its business to particular localities, or they may exact such security for the performance of its contracts with their citizens as in their judgment will best promote the public interest."¹

The question here is not the power of the State of Ohio to lay a charge on interstate commerce, or to prevent a foreign corporation from engaging in interstate commerce within its confines, but simply the right of the State to determine upon what conditions its laws as to the consolidation of corporations may be availed of.

Considering, as we do, that the payment of the charge was a condition imposed by the State of Ohio upon the taking of corporate being or the exercise of corporate franchises, the right to which depended solely on the will of that State, and hence that liability for the charge was entirely optional, we conclude that the exaction constituted no tax upon interstate commerce, or the right to carry on the same, or the instruments thereof, and that its enforcement involved no attempt on the part of the State to extend its taxing power beyond its territorial limits.

Judgment affirmed.

SECTION III.—DISSOLUTION OF A CORPORATION.

COMMONWEALTH v. THE UNION FIRE AND MARINE INSURANCE CO. IN NEWBURYPORT.

MARCH TERM, 1809.

[Reported in 5 *Massachusetts Reports* 230.]

THIS was a motion for a rule upon the defendants to show cause why the Solicitor-General should not be directed to file an information in the nature of a *quo warranto* against them, that the

¹ A portion of the opinion containing a citation and discussion of cases has been omitted.—Ed.

said company might be dissolved, and their corporate powers be adjudged void.

The motion was made by Sullivan, in behalf of seventeen persons alleging themselves to be members of the corporation, and a rule was granted returnable at the term of this court next to be held in the county of Essex. That rule not having been served on the corporation, a new rule to the same effect was moved for, at the term in Essex, and granted, returnable at the July adjournment of this term, and being duly served, the parties appeared.

Jackson, for the defendants, insisted that an information to seize the franchises of a corporation is never ordered at the motion of an individual. Here it ought to be directed by the Government, or at least filed by the Attorney or Solicitor-General *ex officio*.

The Solicitor-General, acknowledging himself to appear, not in his official character, but as counsel for the relators, insisted that where the mischief, or cause complained of, is such as affects the public, the court will order an information at the relation of any individual not specially interested, and *à fortiori* at the instance of corporators, who complain of an injury to themselves.

The facts charged in this case, if proved, would certainly incur a forfeiture of the charter, as they imply a gross misuser of the powers of the corporation. It will not be denied that there is ground from the affidavit of the complainants to believe them true. As they are denied, the truth of them is a proper subject of inquiry by this court, who have the general superintendence of all this species of corporations. If this process does not lie, the mischief is irremediable, and these companies will continue to misuse their powers, and abuse their privileges, under an idea that no authority exists in the Government to correct or punish their malpractices.

The opinion of the court was afterward delivered to the following effect by

PARSONS, Ch. J. This corporation was created by the statute of 1806, c. 89, which required the holders of the corporate stock to pay fifty per cent. of their subscriptions within sixty days after the first meeting of the company; and that no insurance on any one risk should be made for a larger sum than ten per cent. of the capital stock actually paid in.

The parties applying for this rule have alleged that the corporation have been guilty of malfeasance, in not requiring from the members payment of the fifty per cent. of their subscriptions within the time limited by the statute of incorporation, and also in taking greater risks than are authorized by the terms of their incorporation.

We have not inquired into the truth of these allegations, as we

are satisfied that, in this case, such inquiry would be immaterial, because this rule is not moved for in behalf of the commonwealth, or by its authority.

Informations of this nature are properly grantable for the purpose of inquiring into the election or admission of an officer or member of a corporation, when moved for by any person interested in, or injured by such election or admission, if the same was unduly made. And upon such information, if the election or admission was illegal, judgment of a motion might be entered, and a fine might also be imposed on the party who had usurped upon the commonwealth.

In this case the parties applying for the rule do not complain of any illegal election or admission of any officer or member of the corporation; but the object of the application is to obtain a judgment of forfeiture of the franchises of the corporation, and a seizure of them by the commonwealth.

We are well satisfied that a corporation, as well when created by charter under the seal of the commonwealth as by a statute of the legislature, may by nonfeasance or malfeasance forfeit its franchises, and that by judgment on an information, the commonwealth may seize them. And if the allegations stated in the motion for the rule in this case were true, and the commonwealth had caused an information to be filed and prosecuted, for the purpose of seizing the corporate franchises for such malfeasance, judgment for those causes might have been rendered for the commonwealth.

But an information for the purpose of dissolving the corporation, or of seizing its franchises, cannot be prosecuted but by the authority of the commonwealth, to be exercised by the legislature, or by the Attorney or Solicitor-General, acting under its direction, or *ex officio* in its behalf. For the commonwealth may waive any breaches of any condition, expressed or implied, on which the corporation was created; and we cannot give judgment for the seizure by the commonwealth of the franchises of any corporation, unless the commonwealth be a party in interest to the suit, and thus assenting to the judgment.

This distinction between informations in the nature of a *quo warranto*, to impeach any election or admission of a corporate officer or member, and informations to dissolve a corporation, is well settled, and upon sound principles of law.¹

Rule discharged.

¹ *Rex v. Corporation of Carmarthen*, 2 Burr. 869.

STATE OF RHODE ISLAND *v.* PAWTUXET TURNPIKE CO.

IN THE SUPREME COURT OF RHODE ISLAND, OCTOBER TERM, 1867.

[Reported in 8 Rhode Island Reports 521.]

THIS was an application by the defendants for a rehearing upon an information in the nature of a *quo warranto*, and to set aside the judgment of forfeiture rendered at the former hearing.

The case was argued by *Edwin Metcalf* for the petitioners.

Charles H. Parkhurst for the Attorney-General, in behalf of the State.

The opinion of the court was read by DUFFEE, J. The leading ground assigned for this application is, that the prosecution was not instituted in behalf of the State until after a lapse of over six years from the happening of the cause of forfeiture; and we are referred to Angell and Ames on Corporations (7th ed.), § 743, and the cases there cited, as showing that after the lapse of so long a time we ought not to entertain the proceeding. The cases cited in Angell and Ames show that the English rule is not to allow an information in the nature of a *quo warranto* to be filed, at the instance of a private individual, for the purpose of impeaching the title to a corporate office or purchase, where the same has been held or exercised without complaint for more than six years from the time of the alleged usurpation. An information in the nature of a *quo warranto* cannot be filed by a private individual without leave, which the court may, at its discretion, either grant or refuse. To regulate their discretion, as affected by the lapse of time, the English courts adopted the rule which we have stated. But the Attorney-General, representing the Crown in England and the State in this country, may file an information in the nature of a *quo warranto*, without leave, according to his own discretion; and we find no English law which holds that an information, so filed, can be barred by the lapse of six years independently of any statute to that effect. On the contrary, in the leading case of *Rex v. Wardroper*, 4 Burr. 1963, where, after a lapse of nineteen years, the court refused leave to file an information, the judges were careful to express a reservation in favor of the Crown, and said: "Indeed, no length of usurpation shall affect the Crown, *nullum tempus occurrit regi*." The only case which we find that claims a discretion for the court, in this regard, over an information filed by the Attorney-General, is the *People v. Oakland County Bank*, 1 Douglas (Mich.) R. 285. The court in that case do not

profess to follow any precedent, but stand on their own opinion of what is salutary and reasonable. We think the case of *Rex v. Wardroper* declares the sounder doctrine. The Attorney-General, being a public officer, may be presumed to be capable of a salutary and reasonable discretion, as well as the court, and when, acting in behalf of the State, he deems it his duty to prosecute for a forfeiture, it is not for the court, in the absence of any statutory limitation, to say he is too late. Indeed, this court has itself decided that, after the information has once been filed, its discretion ceases, and it has then nothing to do but administer the law the same as in any other case. *State v. Brown*, 5 R. I. 1.

In this case, moreover, the Attorney-General is acting not only on his own discretion, but also under a resolution of the General Assembly authorizing the proceeding, which gives additional strength to the reason why the court should allow the prosecution to go on, notwithstanding the lapse of time.

The ground upon which the court have decreed a forfeiture in this case is, that the defendant corporation did, in the year 1855, sell and convey to the town of Cranston a portion of their road, and that since then they have ceased to keep that portion of the road in repair. The counsel for the corporation claims, as another reason for a rehearing, that under the first section of their charter the corporation had a right to make such sale and conveyance, and that the attention of the court was not directed to this provision at the former hearing. The first section of the charter gives a name to the corporation, and provides that by that name they "shall be and hereby are made able and capable in law, as a body corporate, to purchase, possess, have, and enjoy to themselves, their successors and assigns, lands not exceeding fifty acres, tenements, rents, tolls, and effects of what kind or nature soever, and the same to grant, sell, or dispose of by deed or deeds at their own will and pleasure." This section confers the right which is claimed for the corporation, if the road itself was intended to be included in the fifty acres there mentioned. Subsequent provisions of the charter show that this could not have been the intention. The second section prescribes that the road, to be made and maintained by the corporation, shall be three rods wide, and shall commence and terminate at certain points, pursuing a certain direction. The eleventh section provides that when the earnings of the road shall amount to enough to pay what the road cost, together with the expense of maintaining and keeping it in repair, and twelve per cent. per annum in interest thereon, the corporation shall be dissolved, and the road aforesaid vest in the State. These two sections are inconsistent with a right to sell and convey the road; for after a sale and conveyance legally made, the

road could no longer be maintained by the corporation nor vest in the State. The fifty acres mentioned in the first section must therefore be construed to mean fifty acres in addition to the land on which the road is made—a construction which the more readily suggests itself from the fact that a special mode is provided for the acquisition of the land to be used for the road.

We have also been referred to a statute, passed in 1864, authorizing turnpike corporations to transfer their roads to the towns where they are located, for public highways, and have been asked to infer from thence that the transfer by this corporation of a portion of its road for such a purpose is no ground of forfeiture. The statute is not retrospective in its terms, and it does not purport to be merely declaratory of existing laws. It initiates a new policy; but, while it may afford reason, appealing to the Attorney-General or the legislature, for not prosecuting this corporation for having done what this and every other turnpike corporation in the State are now permitted to do, we do not see how it gives us any right to declare the law, as applicable to an act done in 1855, to be any otherwise than it was before the enactment of the statute.

The counsel for the corporation also presses upon the court again the arguments which were urged at a former hearing. We, however, see no sufficient reason for changing the opinion then expressed, and must, therefore, dismiss the application.

SAMUEL SLEE, APPELLANT, *v.* GEORGE BLOOM *et al.*,
RESPONDENTS.

IN THE SUPREME COURT OF JUDICATURE OF NEW YORK, FEBRU-
ARY, 1821.

[*Reported in 19 Johnson 456.*]

ON appeal from the Court of Chancery.

The bill filed the 24th of April, 1819, stated that the appellant, being possessed of a piece of land on Wappinger's Creek, in Poughkeepsie, on which he had erected a cotton manufactory, with nine hundred and twelve spindles, and finding that the factory demanded greater funds than he could conveniently command, proposed to the respondent, George Bloom, and others, to unite with him in a corporation, to be called "The Dutchess Cotton Manufactory," the stocks of which were to be divided into six hundred shares of \$100 each. That this proposal being acceded to, the appellant and G. Bloom, J. Tallmadge, Jr., Cyrenus Crosby,

George Booth and Robert L. Reade signed and acknowledged a certificate of their desire to become a corporation, under that name, and filed the same in the Secretary's office, and became duly incorporated, on the 12th of December, 1814, pursuant to the act of the legislature, passed the 22d of March, 1811, relative to incorporations for manufacturing purposes. (Sess. 34, c. 67, 1 N. R. L. 245.) That the trustees named in the certificate of incorporation met on the 24th of January, 1815, and chose their officers, to wit, the appellant as president, Crosby as treasurer, and Reade as secretary; and it was agreed that the treasurer and secretary should confer with the appellant, and report the terms on which he would sell the factory, stock, and machinery to the company.

That afterward, in February, 1815, at a meeting of the trustees, a report was made by the treasurer (the secretary being absent) of the terms on which the appellant would sell the factory, with its stock and machinery, the amount of the items, as reported, being \$30,912; that this report was unanimously accepted, and a subscription book opened, by which the subscribers promised to pay to the Dutchess Cotton Manufactory \$100 for every share set opposite their names. The bill set forth the names of the subscribers, and the number of shares subscribed by each. That at a meeting of the trustees, on the 7th of March, 1815, it was resolved that a call of \$5 on each share should be made, payable on the 1st of June following. That the appellant, soon after, executed a deed to the company of his factory, stock, and machinery, for the consideration of \$30,900, which deed was now held by the company. That on the 1st of May, 1815, the appellant received scrip for one hundred and twenty-two shares of stock, which he paid in full, by deducting the same from the amount due to him from the company. That on the 30th of September, 1815, the appellant received scrip for fifty more shares, and paid up the same in like manner. That at a meeting of the trustees, on the 20th of September, 1815, at which Bloom, Crosby, and others were present, a further call was made for \$10 on each share, payable on the first Monday of November then next, and the further sum of \$5 on the first Monday of December following. That at a meeting on the 25th of January, 1816, three persons were appointed a committee to inquire into the affairs of the corporation; that at a meeting of the stockholders, on the 20th of April, 1816, pursuant to public notice, seven trustees were elected. At a meeting held the 27th of April, 1816, it was resolved to make a public call of \$25, on each share, payable on the 1st of June then next; that the stockholders generally neglected to make payment, and in June, 1816, it was resolved that suits should be commenced to enforce payment. At a meeting, October 19, 1816, it was resolved that it was

inexpedient to continue the factory in operation; and the appellant, who then superintended it, was directed to shut it up, discharge the workmen, and take care of the property; and a committee was appointed to examine the accounts and settle with the appellant. That at a meeting in November, 1816, the committee appointed to liquidate the account of the appellant reported a balance in his favor of \$24,443.35; and it was resolved that a proper voucher for the balance should be given to him. A bond to the appellant was afterward executed, signed by the president, treasurer, and secretary, and sealed with the seal of the corporation, for \$23,493.35, being the sum remaining due to him, after the stock subscribed by him, amounting to \$17,200 paid up in full, was deducted from the sum due to him from the company. That the appellant having obtained a loan of the Manhattan Company of \$10,000, which he expended in advances for the company, gave his note for that sum, dated the 1st of December, 1815, endorsed by Bloom, Crosby, Booth, and Cocks, payable in twelve months, and which sum went into his account, and made part of the balance found due to him. To secure his endorsers, the appellant gave them a bond and warrant of attorney to confess judgment for \$20,000, on which they entered up a judgment, on the 1st of June, 1816. That when the note became due the appellant was unable to pay it, and the endorsers assumed the debt, and gave their own note to the bank for the amount, endorsed by Nathan Myers, and which note had been in part paid by moneys collected of the stockholders, and in part by the appellant himself. That in January, 1817, the appellant, finding himself pressed by a judgment obtained by some of the individuals of the company who had been endorsers of his note, commenced a suit against the company, on the bond given to him, on which a judgment was confessed and perfected, in May term, 1817, with a stay of execution until October term following, for the penal sum of \$46,986. The bill then stated various meetings of the subscribers in the year 1817, and their proceedings. That on the 12th of August, 1817, at a meeting of the trustees, it was resolved that any person might transfer his stock, and be discharged from any future calls, on paying up the calls of fifty per cent. which had then been made, and the costs; and that no proceedings should be had to enforce the payment of further calls, other than by way of forfeiture. That on the 3d of November, 1817, at a meeting of the trustees, it was resolved to lease the factory for three years, and that the stockholders might have the privilege of forfeiting their stock to the company, by paying up thirty per cent. on their shares, by the 1st of December following, which resolution was opposed by the appellant. That most of the stockholders had availed themselves

of this resolution, and wholly abandoned the factory, and everything relating to it, though they had not given up their scrip. That no election of trustees had been made since April, 1817, and the stockholders had come to a resolution never to make another election, but to abandon the factory and corporation altogether. That in October, 1817, Crosby, Bloom, Booth, and Cocks issued a *fieri facias* against the appellant on the judgment against him, by virtue of which the real estate of the appellant, worth \$9000, beside the land and property at the factory, became liable to sale. That in November, 1817, the appellant, hearing that an execution had been issued by Bloom and the others on the judgment obtained by them against the company, caused a *fieri facias* to be issued on the judgment in his favor. That in January, 1818, the attorney of the company, pursuant to a previous resolution of the trustees, applied all the funds in his hands, amounting to \$4105.59, toward the payment of the note for \$10,000, leaving a balance of \$6538.58. That to prevent a sacrifice of his property, to pay that balance, the appellant procured George B. Evertson to become security to the bank for that amount, and thereupon the appellant's note for \$10,000 was given up, and his endorsers wholly discharged. That to secure Evertson, the appellant, on the 21st of January, 1818, assigned to him all his real estate and the avails of all the property of the company that might be sold under his execution against the company. Under the execution on his judgment, the real estate of the company was sold by the sheriff in February, 1818, for \$102, and the personal estate for \$385.50, to George B. Evertson as the highest bidder; and after deducting the sheriff's fees, there remained the sum of \$460.18, to be applied on the appellant's execution. That no payment had been made on the judgment, unless the sum of \$4105, applied in part payment of the note for \$10,000, be considered as part payment of the judgment; and that if it is so considered, there will then be a balance due to the appellant of \$18,958.37, which he has no means of obtaining, unless the stockholders are compelled to pay up their subscriptions. That there has been no meeting of the stockholders since May, 1817, nor have the trustees had any meeting or transacted any business since December, 1817; but have determined to abandon and give up the factory and corporation, and not to make any further calls on the stockholders, nor to provide any means whatever to pay the appellant; but the trustees, with all the other respondents, have determined to suffer, and cause the corporation to be dissolved, and had already suffered and caused the same to be dissolved, by their said transactions and omissions, in relation thereto. That the books and records of the corporation are in the power or possession of the respondents. That

there is no debt due by the corporation, except that owing to the appellant. That he had no means of ascertaining what amount of his debt could be obtained of the corporation, except by a legal sale of their property on execution; and although it was sold at a sacrifice, yet the appellant was unable, owing to his embarrassment, etc., to bid upon it, or to cause it to be sold for a greater sum, and the trustees and stockholders, though they had notice of the sale, neglected all attention to it; nor did they show any disposition to preserve the property or keep the corporation in existence, etc. The bill prayed that those of the respondents who had made any payments on their stock might set forth the same, and that the solvent stockholders, to wit, all the respondents (except Crosby), might be severally decreed to pay to the appellant, for his benefit, such sum, or balance, on each and every share of stock subscribed by them, as should be sufficient, with a due proportion to be allowed by the appellant on the fifty shares purchased by him of James Tallmadge, Jr., Aaron Stafford, and Robert Stafford, to pay to the appellant the debt due to him from the said Dutchess Cotton Manufactory, with interest, and to indemnify him for the losses he has sustained by the unjust and oppressive conduct of the trustees and the stockholders, and that it might be left with the solvent respondents and E. Crosby to arrange and adjust among themselves any claims they may have on him, by reason of any balance that may remain due and unpaid on the stock subscribed by him; and that the appellant might have such other and further relief, by a decree against the respondents in their individual capacities, or as members of the said corporation, if they pretend that the same has not been already dissolved, as the nature of his case might require

The respondents, Bloom, Crosby, Cocks, Coolidge, Stockholm, Davis, Nelson, Thompson, Tappen, M. Hoffman, Reynolds, D. Hoffman, and Conklin, appeared and filed their answers. The respondent, Bloom, admitted most of the material facts stated in the bill. He charged that the appellant induced him and the other respondents to enter into the association for the purchase of the cotton factory, by urgent solicitations, artful assurances, and exaggerated statements of the value, profits, etc. That, among other inducements, he assured the respondent that if he would take shares and aid in procuring the incorporation of the company, he, the appellant, would at any time, when the respondent wished to relinquish his shares, take back the stock, and become responsible, with good security, for what moneys the respondent might advance, payable in two years, and for any further calls on the stock. That the appellant's object in prosecuting the suit on the bond to judgment and execution, and having the property

sold, was to regain the factory and machinery, and draw from the stockholders their subscriptions for the payment of his debts. That Evertson purchased the property for the benefit of the appellant, who was, in fact, the real owner, subject only, by way of security to Evertson, for the sum he had assumed to pay the Manhattan Bank. He denied that the books and papers had been withheld from the appellant, and alleged that they were in his possession.

The other respondents, in their several answers, referred themselves to the answer of Bloom, as containing, according to their knowledge, recollection, and belief, the truth as to the several matters stated and alleged by him, and they set up particular grounds of defense as regarded each of them, separately. The respondent, Pells, put in a separate answer, admitting the material facts in the bill, except as to the amount paid on the stock purchased by him. The bill was taken *pro confesso* against the respondents, Robert Forrest, Nathan Myers, Nathaniel Ferris, George Booth, S. Howard, Wintringham, P. Ackerman, and C. R. Livingston; but it was stipulated by the appellant, as to the two last named respondents, that he would not take a final decree against them, provided they would severally pay on their shares a due proportion according as others, under like circumstances with them, and who had put in their answers, might be compelled to pay. It was admitted that C. R. Livingston, having paid thirty per cent. on her stock, had transferred it to the company; but that Ackerman had not paid anything on his stock, nor had he transferred it.

Replications were filed to the answers put in, and proofs taken in the cause.

The cause was brought to a hearing upon the pleadings and proofs, in April, 1821; and on the 19th of July the Chancellor made the following decree: "It is declared that the plaintiff has not shown any right or title to sue the defendants, as members or stockholders of the Dutchess Cotton Manufactory, for a debt due to him from the said corporation, inasmuch as the said corporation does not appear, in judgment of law, dissolved, nor can it be dissolved within the period limited by the statute under which it was erected, for any non-user or misuser of its franchises, without due process of law; and it is further declared, that assuming the said corporation to be dissolved, the plaintiff would not be entitled to the assistance of this court, as against the individual persons and property of those defendants, who have paid into the corporation, at the rate of thirty per cent. upon their respective shares; inasmuch as by the resolution of the board of trustees of the 16th of August, 1817, to which the plaintiff was a party, as a trustee, and by the resolution of the said board of the 3d day of November,

1817, to which the plaintiff, as a trustee, by repeated acts, gave his subsequent assent and ratification, the plaintiff has, in justice and equity, barred himself from the operation of any further claim, unless it be to exact the forfeiture of their shares; nor would he be entitled to the assistance of this court as against the individual persons and property of those defendants who have not paid in, at the rate of thirty per cent., except it might be to require them to pay in, upon their shares at the rate of fifty per cent. on the amount of arrearages of former calls, prior to the 18th of August, 1817, and to exact a forfeiture of their shares for the residue. It is, therefore, ordered, adjudged, and decreed, etc., that the plaintiff's bill be dismissed without costs, as to those defendants who have not appeared, but with costs as to those defendants who have appeared and answered, to be taxed, and to be recovered by them against the plaintiff, according to the course and practice of this court.

The Chancellor assigned his reasons for this decree, which were the same as those expressed in the opinion delivered by him in the Court of Chancery. (*Vide* 5 Johns. Ch. Rep.¹)

P. Ruggles and T. A. Emmet for the appellant.

T. I. Oakley for the respondents.

SPENCER, Ch. J. (after stating the facts in the case). With the most profound and undissembled respect for the Chancellor, I am constrained to differ from the opinion held by him, that this corporation is not dissolved.

The object and intention of the legislature in authorizing the association of individuals for manufacturing purposes was, in effect, to facilitate the formation of partnerships, without the risks ordinarily attending them, and to encourage internal manufactures. There is nothing of an exclusive nature in the statute; but the benefits from associating and becoming incorporated, for the purposes held out in the act, are offered to all who will conform to its requisitions. There are no franchises or privileges which are not common to the whole community. In this respect, incorporations under the statute differ from corporations to whom some exclusive or peculiar privileges are granted. The only advantages of an incorporation under the statute over partnerships, and the only substantial difference between them, consists in a capacity to manage the affairs of the institution, by a few and select agents, and by an exoneration from any responsibility beyond the amount of the individual subscriptions.

In coming to the conclusion that the corporation in this case is dissolved, I lay out of the case everything of misuser or non-

¹ So much of Chancellor Kent's opinion as relates to the question of the dissolution of the corporation is given below.—ED.

user, excepting the influence which the fact of non-user may have as evidence, connected with other facts, to show the renunciation of the corporate rights. Upon the authorities and for the reasons given by the Chancellor, misuser or non-user cannot be relied on as a substantive and specific ground of a dissolution.

The ground on which I place my opinion, that the corporation is dissolved, is, that they have done, and suffered to be done, acts equivalent to a direct surrender. The Chancellor concedes, and it does not, in my judgment, admit of a doubt, that a corporation may be dissolved by a surrender of all their corporate rights.

In 2 Kyd on Corp. 467, the rational and true rule is laid down; he says: "The rule adopted in all the cases which have occurred on this question seems to have been this, that where the effect of the surrender is to destroy the end for which the corporation or the corporate capacity was instituted, the corporation or the corporate capacity is itself destroyed;" and we have the high authority of Lord Coke to the same effect. He says: "If there be a warden of a chapel, and the chapel and all the possessions be aliened, he ceases to be a corporation, because he cannot be warden of nothing; but if the body of a prebend be a manor and no more, and the manor be recovered from the prebendary, by title paramount, yet his corporate capacity remains, because he has *stallum in choro, et vocem in capitulo*, and he is prebendary, although he has no possessions." Thus, according to Lord Coke, a recovery by title paramount would have produced an extinction of the corporation, had it reached all the rights and powers of the corporation, but inasmuch as there were rights unaffected by the recovery, it did not work a dissolution. Suffering an act to be done which destroys the end and object for which the corporation was instituted must be regarded as equivalent to the doing an act which produces the very same consequences. A surrender is an act *in pais*; it can, therefore, be no objection in this case that the acts which have dissolved the corporation are acts *in pais*.

This bill was not filed until the 24th of April, 1819. In February, 1818, all the estate, real and personal, of the corporation was sold under an execution; and, as has already been stated, the corporation has totally ceased from acting since December, 1817. The bill charges, substantially, that the corporation is dissolved; and not one of the respondents asserts that it does exist, or that there is the remotest idea of resuscitating it. Here is, then, a corporation possessed of nothing, abandoning the end and object of their institution, without pretending that they ever hope or expect to resume their functions; and, it may be added, all the corporators either admit the dissolution of the corporation (I speak of those who have suffered the bill to be taken *pro confesso*) or deny that

they are incorporators. Thus presenting the phenomenon of a corporation without corporators, a nominal, inert body, pretending to have life and existence. Such an anomaly cannot be recognized. The argument is, that being incorporated for twenty years, there exists a corporate capacity during that period, and that although all the functions of the corporation have ceased, yet they may be resumed. The second section of the act provides that as soon as the certificate shall be filed, the persons who shall have signed and acknowledged the same, and their successors, shall, for the term of twenty years next after, be a body politic and corporate in fact and in name, etc. The legislature never meant, nor does the act authorize the conclusion, that the corporation should remain and continue during all that period, *nolens volens*. It was implied that during that time they should do nothing to forfeit their rights, nor surrender them back, or do any act tantamount thereto. The act prolongs the corporation for twenty years, subject to all the incidents attending corporations; and I have endeavored to show that one of the incidents is an extinction of the corporation, if it does what is equivalent to a surrender. I doubt, extremely, whether the capacity to resume the functions of the corporation does, in fact, exist, but it is not necessary to decide that point. I consider it merely as a matter of speculation, thrown out, without any practical reference to the cause, as a stumbling block to the attainment of justice between the parties. For all the substantial purposes of justice, and in effect, the corporation is dissolved. In the case of the *King v. Pasmore*, 3 Term Rep. 244, Ashhurst, J., says as to the contrariety of opinions in the books on this subject, "I shall not attempt to reconcile them, but we ought to lean to that side which is supported by reason." Possibly the seeming contrariety may have been, in some degree, occasioned by the equivocal use of the term "dissolved;" as far as concerns the power of the Crown to grant a new charter, I think the corporation was dissolved. As to some particular purposes which do not relate to the powers of government, but to personal privileges which are annexed to the persons of the remaining individuals, such as rights of common, etc., it may be said not to be dissolved, at least till the Crown interposes. Grose, J., in the same case, said: "Now, in point of good sense, when the purposes for which a corporation was created can no longer be answered, there is no reason why it should not be considered to be so far dissolved, as that the Crown may raise there a new corporation," etc.

The doctrine urged by the respondents' counsel is, that this corporation must endure for twenty years, unless it is judicially declared to be dissolved, for misuser or non-user; and we perceive, by some of the cases cited by the Chancellor, that even where there

had been an omission to elect burgesses for twenty-two years, doubts were entertained whether there had been such a non-user as vacated the charter. It is observable that the appellant has no control over the process or remedy to dissolve this corporation for non-user. The People of the State, through their law officer, can only institute such proceedings. Then, as regards the appellant, if we are to consider this corporation in existence, he must patiently await the lapse of twenty years before he can have any remedy. I say, in the words of Lord Mansfield (3 Burr. Rep. 870), "without an express authority, so strong as not to be gotten over, we ought not to determine a case so much against reason."

In point of good sense, this corporation was dissolved, within the meaning and intent of the act, as regards creditors, when it ceased to *own* any property, real or personal, and when it ceased, for such a space of time, from doing any one act manifesting an intention to resume their corporate functions. The end, being, and design of the corporation were completely determined; and if even it had the capacity to reorganize and reinvigorate itself, the case has happened when, as relates to its creditors, it is dissolved.

If I am right thus far, then, by the 7th section of the statute, the persons composing the company at the time of its dissolution are individually responsible, to the extent of their respective shares, for the debts then due, and owing, by the company.

With respect to the period of the dissolution, it appears to me that we may safely say it happened on the 1st of February, 1818, when all the property of the company was sold; for since that time no corporate act has been done.

Yates and Van Ness, JJ., concurred.

Platt, J., being related to one of the parties, declined giving any opinion.

Woodworth, J., not having heard the argument, gave no opinion.

The rest of the court (Austin, Senator, dissenting) concurring in the opinion of the Chief Justice, it was thereupon ordered, adjudged, and decreed that the decretal order of the Court of Chancery be reversed, and that the cause be remitted to the Court of Chancery.

THE BOSTON GLASS MANUFACTORY *v.* MARY
LANGDON.

IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS, APRIL 7,
1834.

[*Reported in 24 Pickering 49.*]

ASSUMPSIT on a promissory note given by the defendant to the plaintiffs. The defendant pleads in abatement, that at the time of the purchase of the writ there was not, and now is not, any such corporation established by law, called the Boston Glass Manufactory, as in and by the writ is supposed. The plaintiffs reply that there was and is such a corporation; and tender an issue; which is joined.

At the trial, before Morton, J., the plaintiffs offered in evidence their act of incorporation, and showed their organization under it in 1811.

The records of the corporation were introduced by the plaintiffs, and were used and relied upon by both parties.

The defendant then introduced an indenture, dated the 27th of May, 1827, assigning all the property of the corporation to certain persons, in trust to pay, *pro rata*, such creditors as should become parties to the indenture. This instrument contained covenants, that the assignees might use the name of the corporation in the collection of the debts, and in the disposition of the property assigned; that the corporation would not hinder or obstruct them in the performance of these functions; and that it would make any further conveyances and assurances which might become necessary, and perform any other and further acts which might be required to enable the assignees fully to execute their trust. No provision was made for a release to the corporation by the creditors, nor for paying over to the corporation the surplus, if any, of the property assigned. The defendant also referred to all the records subsequent to 1817, and contended that the assignment of the property of the corporation, and the omission to hold annual meetings, to choose directors, and to transact business, as appears by the records and books of the corporation, supported the issue on her part and entitled her to a verdict.

But the jury were instructed that the evidence was competent to prove the establishment and continuance of the corporation down to the present time.

The plaintiffs then claimed to have the damages assessed by the jury, if they found a verdict in their favor, and offered in evidence the note declared on. This was objected to by the defendant, be-

cause the note had been assigned. But the objection was overruled.

The defendant then offered to prove that the note was without consideration. This evidence was objected to and was excluded.

The jury found a verdict for the plaintiffs for the whole amount of the note and interest.

The defendant excepted to the decisions and instructions of the judge; and for the reasons above appearing moved for a new trial.

Austin for the defendant.

Sullivan for the plaintiffs.

MORTON, J., delivered the opinion of the court. Shaw, Ch. J., did not sit in the cause. The non-existence or death of the plaintiff may properly be pleaded in abatement. Chitty's Pl. 482; Story's Pl. 24. But whether, as it entirely and perpetually destroys the plaintiff's right to recover, it may not also be pleaded in bar, it is not necessary to determine. Proprietors of Monumoi *v.* Rogers, 1 Mass. R. 159; First Parish in Sutton *v.* Cole, 3 Pick. 245. Whether the plea conclude in abatement or bar, the issue being found against the defendant, the judgment must be peremptory. The established rule is, that in dilatory pleas, when the issue is found against the defendant on matters of fact, the judgment must be in chief. Gould's Pl. 300; Howe's Pract. 215.

The principal question for our consideration is, whether judgment shall be rendered on the verdict. The defendants' counsel contends that the evidence introduced will not support the verdict, but that the verdict is against the evidence and the law and should be set aside.

The point which has been determined by the jury, though necessary to be submitted to them with proper instructions, is quite as much a matter of law as of fact; and we the more readily enter into the examination of it.

The legal establishment and due organization of the corporation were admitted; but it was contended that the facts disclosed showed a dissolution of it.

The elementary treatises on corporations describe four methods in which they may be dissolved. It is said that private corporations may lose their legal existence by the act of the legislature; by the death of all the members; by a forfeiture of their franchises, and by a surrender of their charters. 2 Kyd on Corp. 447; 1 Bl. Comm. 485; 2 Kent's Comm. (1st ed.) 245; Angell & Ames on Corp. 501; Oakes *v.* Hill, 14 Pick. 442. No other mode of dissolution is anywhere mentioned or alluded to.

1. In England, where the Parliament is said to be omnipotent,

and where, in fact, there is no constitutional restraint upon their action but their own discretion and sense of right, corporations are supposed to hold their franchises at the will of the legislature. But if they possess the power to annul charters, it certainly has been rarely exercised by them. In this country, where the legislative power is carefully defined by explicit fundamental laws, by which it must be governed and beyond which it cannot go, it has become a question of some difficulty to determine the precise extent of their authority in relation to the revocation of charters granted by them. But as it is not pretended that there has been any legislative repeal of the plaintiffs' charter, it will not be useful further to discuss this branch of the subject.

2. As all the original stockholders are not deceased, the corporation cannot be dissolved for the want of members to sustain and exercise the corporate powers. Besides, this mode of dissolution cannot apply to pecuniary or business corporations. The shares, being property, pass by assignment, bequest, or descent, and must ever remain the property of some persons, who of necessity must be members of the corporation as long as it may exist.

3. Although a corporation may forfeit its charter by an abuse or misuser of its powers and franchises, yet this can only take effect upon a judgment of a competent tribunal. 2 Kent's Comm. (1st ed.) 249; *Corporation of Colchester v. Seaber*, 3 Burr. 1866; *Smith's case*, 4 Mod. 53. Whatever neglect of duty or abuse of power the corporation may have been guilty of, it is perfectly clear that they have not lost their charter by forfeiture. Until a judicial decree to this effect be passed, they will continue their corporate existence. *The King v. Amery*, 2 T. R. 515.

4. Charters are in many respects compacts between the Government and the corporators. And as the former cannot deprive the latter of their franchises in violation of the compact, so the latter cannot put an end to the compact without the consent of the former. It is equally obligatory on both parties. The surrender of a charter can only be made by some formal solemn act of the corporation, and will be of no avail until accepted by the Government. There must be the same agreement of the parties to dissolve that there was to form the compact. It is the acceptance which gives efficacy to the surrender. The dissolution of a corporation, it is said, extinguishes all its debts. The power of dissolving itself by its own act would be a dangerous power, and one which cannot be supposed to exist.

But there is nothing in this case which shows an intention of the corporators to surrender or forfeit their charter, nor anything which can be construed into a surrender or forfeiture.

The possession of property is not essential to the existence of a corporation. 2 Kent's Comm. (1st ed.) 249. Its insolvency cannot, therefore, extinguish its legal existence. Nor can the assignment of all its property to pay its debts, or for any other purpose, have that effect. The instrument of assignment was not so intended, and cannot be so construed. All its provisions look to the continuance of the corporation. It contains covenants that the assignees may use the corporate name for the collection of the debts and the disposition of the property assigned; that the corporation will not hinder or obstruct them in the performance of these functions; that it will make any further conveyances and assurances which may become necessary, and will do and perform any other and further acts which may be required to enable the assignees fully to execute their trust. The instrument which covenants for future acts cannot be construed to take away all power of action.

The omission to choose directors clearly does not show a dissolution of the corporation. Although the proper officers may be necessary to enable the body to act, yet they are not essential to its vitality. Even the want of officers and the want of power to elect them would not be fatal to its existence. It has a potentiality which might, by proper authority, be called into action, without affecting the identity of the corporate body. *Colchester v. Seaber*, 3 Burr. 1870.

But here in fact was no lack of officers. Although no directors had been chosen for several years, yet, by the by-laws of the corporation, the directors, though chosen for one year, were to continue in office till others were chosen in their stead.

The damages were properly assessed by the jury. The defendant having elected to try her case upon a plea in abatement must submit to the legal consequences of that form of trial. Perhaps the court might have assessed the damages as in case of default. But most obviously the better course was to submit the subject to a jury. In doing this the defendant could not be allowed to go into the whole defense as upon the general issue. The rule adopted at the trial was the correct one.

Judgment according to verdict.

THE PEOPLE *v.* THE PHŒNIX BANK.

IN THE SUPREME COURT OF JUDICATURE OF NEW YORK, OCTOBER
TERM, 1840.

[*Reported in 24 Wendell 431.*]

INFORMATION in the nature of a *quo warranto* against the defendants for claiming to be and acting as a corporation. The information was filed March 25, 1838. The defendants pleaded the several acts of the legislature by which they were created and continued a corporation. They were originally incorporated by the name of the New York Manufacturing Co. Statutes of 1812, p. 509. The affairs of the company were to be managed by fifteen directors, of whom the stockholders were to choose all but one, who was to be appointed annually by the council of appointment, in behalf of the State, and was to hold his office for one year, and until another should be appointed in his stead. §§ 3, 5. The corporation subsequently took its present name—Statutes of 1817, p. 30, § 4; and in 1831 the charter was extended until 1854, and the company was subjected to various provisions of the Revised Statutes, and to the safety fund law. Statutes of 1831, p. 28.

The Attorney-General put in sixty-two replications, each of which alleged that the defendants had taken usury on making a loan or discount in the course of their business as bankers. The acts were alleged to have been done in the years 1836 and 1837.

On the 19th of March, 1840, the defendants rejoined that on the tenth day of that month, William B. Townsend was by the Governor and Senate nominated and appointed a director of the company in the place of James Campbell, whose term of office had expired; that he was commissioned, and had entered on the duties of his office. Verification, etc. The Attorney-General demurred, and the defendants joined in demurrer.

S. A. Foote and Willis Hall, Attorney-General, for the people.
D. Lord, Jr., and J. Prescott Hall for the defendants.

BRONSON, J. No question has been made upon the sufficiency of the replications. The case, then, comes to this: the Attorney-General alleges that the defendants have forfeited their corporate privileges by taking usury. The defendants answer that a State director has since been appointed by the Governor and Senate; and this act, they insist, amounts to a waiver or pardon of the forfeiture. The conclusion does not follow from the premises.

No one could take advantage of the forfeiture in a collateral

manner. It could only be asserted by a direct legal proceeding on the part of the Government to dissolve the corporation. Notwithstanding the existing cause of forfeiture, the defendants were a corporation *de facto*, and might continue to exercise their franchise until judgment of ouster should be pronounced against them. In the mean time it was the duty of the Governor and Senate, as well as all others, to treat the defendants as a legally existing corporation. The appointment of a State director was, therefore, perfectly consistent with the intention to continue this prosecution, and insist on the forfeiture.

Should it be conceded that the Governor and Senate had a dispensing power, it does not appear that the power has been exercised. We are not authorized to follow the suggestion of the defendants' counsel, and assume that the appointment was made for the purpose of waiving the forfeiture. There is no such allegation in the rejoinder; and besides, we cannot shut our eyes to the fact that there was another and a sufficient ground for the exercise of the appointing power. Indeed, if the public officers believed that the defendants had violated their charter, they had a cogent reason for making the appointment, to the end that there might be one director in the board to watch over the public interests until the forfeiture could be asserted, and the corporation dissolved in the forms prescribed by law.

Enough has been said to dispose of this case. But I must not be understood as admitting that the Governor and Senate, without the concurrence also of the Assembly, had any dispensing power. They had no more authority to waive or pardon the forfeiture than any other public officer or body of men. Indeed, the Attorney-General had more power over this matter than the Governor and Senate united; for if he refused to prosecute, the wrong charged upon the defendants would go unpunished, and the corporation would continue to exist and enjoy its privileges in the same manner as though there had been no violation of the charter. Still, the neglect to prosecute would not amount to a pardon; it could only operate as a waiver so long as the omission continued, and would be no answer to a *quo warranto* whenever he, or his successor in office, might choose to insist on the penalty.

In England, where corporations may be created by royal charter, the King can pardon a forfeiture, by granting restitution; but he has, I think, no such power in relation to corporations created by act of Parliament. *The King v. Amery*, 2 T. R. 568, 569. *Newling v. Francis*, 3 *id.* 189. *The King v. Miller*, 6 *id.* 277. So, here, where corporations are created by the legislature, that body can waive the forfeiture, by ratifying and confirming the original grant. *The People v. The Manhattan Co.*,

9 Wendell, 351. But no other body of men has any such dispensing power. The franchise is granted upon condition that it shall become void in case of misuser; and although the corporation will continue to exist until the forfeiture is asserted in the forms prescribed by law, the condition can only be changed, or the penalty released, by the power which made the original grant. The legislature may, perhaps, delegate its authority to pardon the offense; but that has not been done.

The rejoinder does not show that any act has been done which is inconsistent with the assertion of the forfeiture; and if it were otherwise, the Governor and Senate, without the concurrence of the Assembly, had no dispensing power.

Judgment for the people.

HENRY P. DENIKE *et al.*, APPELLANTS, v. THE NEW YORK
& ROSENDALE LIME AND CEMENT CO. *et al.*,
RESPONDENTS.

IN THE COURT OF APPEALS OF NEW YORK, APRIL 6, 1880.

[Reported in 80 New York Reports 599.]

APPEAL from judgment of the General Term of the Supreme Court, in the First Judicial Department, affirming a judgment in favor of defendants, entered upon the report of a referee.

The nature of the action and the facts appear sufficiently in the opinion.

John J. Macklin for appellants.

Henry P. Wells for corporation, respondent.

George E. Horne for respondent, Harney.

EARL, J. The complaint in this action alleges that the New York & Rosendale Lime and Cement Co. was a corporation organized in February, 1873, under the general manufacturing law of 1848 and the acts amendatory thereof; that the plaintiffs were stockholders in the company; that the company owned for the purpose of its business, in Ulster County, valuable lands, buildings and machinery; that in January, 1874, the company executed to the defendant Harney, who was then a trustee of the company, a bond, and, as collateral thereto, a mortgage upon its land and property for \$20,000; that a large portion of the sum secured by the mortgage was for an alleged debt incurred by the company on account of an illegal and fraudulent purchase from him of 110

shares of the capital stock of the company for more than it was worth; that two-thirds of the stockholders did not assent to the giving of the mortgage, as required by the statute; that the business of the company had been unsuccessful and unremunerative, while exorbitant salaries were paid; that a lease of the property of the company had been made by its officers a few months before the commencement of the action for a small rental, and that the company had virtually suspended its business and was not engaged in any active business; that on the 31st day of October, 1876, defendant Harney commenced an action to foreclose his mortgage, and in November thereafter obtained judgment of foreclosure; that defendant Tompkins was the president of the company, and that on the 23d day of November, 1876, he recovered a judgment against it for \$33,699.45, upon notes which are referred to, and it is alleged that the judgment was collusive, illegal and void, and that at the time of the commencement of the action upon the notes, the company was insolvent and unable to pay its debts, and that the actions upon the mortgage and upon the notes were instituted and prosecuted for the purpose of divesting the company of its property and absorbing the proceeds thereof, and wiping out and extinguishing the interests of the plaintiffs and of such other stockholders as were not combining and confederating with Harney and Tompkins; and the plaintiffs demand judgment that the mortgage and judgment of foreclosure and the lease and the judgment in favor of Tompkins be vacated and cancelled; that the trustees and officers of the company account for their management and for the disposition of the funds and property of the company; that the company and its officers be restrained from exercising any of its corporate rights or franchises; and that the company be dissolved, and that a receiver of its property be appointed.

The defendants appeared and denied all the material allegations of the complaint upon which any claim for relief was based.

The cause was referred to a referee, and he decided the same against the plaintiffs. There was no proof or finding, and there was no claim upon the argument before us, that there was any illegality or fraud in the judgment obtained by Tompkins, or in the lease which was executed to Hiram Snyder, and hence they need no further notice.

The mortgage to Harney was executed to him in pursuance of a resolution adopted at a regular meeting of the directors, and it was signed by the plaintiff Bell, who was then president of the company. The referee found, upon evidence entirely sufficient, that the mortgage was given and taken in good faith, and that it

was free from any fraud; that the company received in cash the entire amount of the \$20,000 secured thereby; and that it was intended to promote the interests of the company, and that such interests were not injured thereby. There was, then, no ground upon which the mortgage could be impeached, unless it be upon the ground that the written assent of stockholders owning at least two-thirds of the capital stock was not first obtained and filed in the county clerk's office, as required by c. 517 of the Laws of 1867, as amended by c. 481 of the Laws of 1871; or upon the ground that the mortgage was not executed "to secure the payment of any debt" of the company, as also required by those laws. It was alleged in the complaint that the requisite assent of stockholders was not obtained; but such allegation was denied in the answer. There was no proof whatever in reference to it, and there was no finding by the referee, and there was no request of him to find anything in reference to it. It must, after judgment of foreclosure has been regularly obtained upon the mortgage, be presumed, in the absence of all proof, that the assent was obtained and filed. The judgment, unless impeached in some way, is conclusive against the corporation and all its stockholders as to the validity of the mortgage; and if the plaintiffs sought to impeach it on the ground that the mortgage was given without the requisite assent, they should have proved it. The burden of impeaching the mortgage and judgment was upon them. For the same reasons, if the plaintiffs claimed that this mortgage was not given to secure the payment of any debts of the company, they should have proved that it was neither given to Harney to secure any debt due to him, nor that the \$20,000 was used to pay debts of the company. *Carpenter v. The Black Hawk Gold Mining Co.*, 65 N. Y. 43. Their proof did not go to this extent, and there was no finding or request to find that it did. Therefore, without determining whether these plaintiffs were so situated that they could in this action have assailed this mortgage and the judgment, if it had been found that the requisite assent had not been given, and that the mortgage had not been executed to secure the payment of debts of the company, we are of opinion that no error was committed by the referee in denying the relief claimed by the plaintiffs in reference to them.

It must now be considered whether these plaintiffs as stockholders can maintain this action for the dissolution of the corporation and the appointment of a receiver, and for thus winding up the affairs thereof.

A corporation owes its life to the sovereign power, and under what circumstances it shall forfeit or be deprived of that life depends upon the same power. A corporation may be dissolved by

forfeiture through abuse or neglect of its franchises; but such forfeiture, unless there be special provisions by statute, can only be enforced by the sovereign in some proceeding instituted in its behalf. Here there is no allegation in the complaint that this corporation had forfeited its charter, or that it had in any way become dissolved; but a portion of the relief prayed is that it be dissolved. All the stockholders uniting might undoubtedly surrender the franchises of a corporation and work its dissolution. But can a portion of them do this, in the absence of statutory authority? There is no statute in this State which authorizes a portion of the stockholders to maintain an action to dissolve a manufacturing corporation, and I know of no decision holding that they can. The statutes (2 R. S. 467) provide for the voluntary dissolution of corporations, but that must be upon the application to a proper court "of the directors, trustees, or other officers having the management of the concerns" of the corporation, but not upon the application of a portion of the stockholders. It is provided in reference to banking and insurance corporations which shall have become insolvent or unable to pay their debts, or which shall have violated their charters, that they may, upon application to a court of equity, be restrained from further exercise of their corporate rights and franchises, and receivers may be appointed of their property; and such application may be made by the Attorney-General in behalf of the State or of any creditor or stockholder. 2 R. S. 465. But this is not such a case. It is further provided that when a judgment shall be obtained against any corporation, and an execution issued thereon shall have been returned unsatisfied, a court of equity may, at the suit of the judgment creditor, sequester the property of such corporation and appoint a receiver. 2 R. S. 463. But this remedy is confined to the judgment creditor. There is abundance of authority for holding that there is no general power in a court of equity for sustaining such an action as this prosecuted by a portion of the stockholders. *Verplanck v. Mercantile Ins. Co.*, 1 Edw. Ch. 84; *Galwey v. U.S. Sugar Refining Co.*, 13 Abb. Pr. 211; S. C., 36 Barb. 256; *Ramsey v. The Erie Railway Co.*, 7 Abb. Pr. (N. S.) 156, 181; *Howe v. Deuel*, 43 Barb. 505; *Latimer v. Eddy*, 46 *id.* 61; *Belmont v. The Erie Railway Co.*, 52 *id.* 637, 665; *Gilman v. The Greenpoint Sugar Co.*, 4 Lans. 483; *Wilmersdoerffer v. The Lake Mahopac Imp. Co.*, 18 Hun, 387; *The People v. The Erie Railway Co.*, 36 How. Pr. 129. It remains, therefore, only to inquire whether this action can be maintained under sec. 38 (2 R. S. 463), which is as follows: "Whenever any incorporated company shall have remained insolvent for one whole year; or for one year shall have neglected or refused to pay and discharge its notes or other

evidences of debt; or for one year shall have suspended the ordinary and lawful business of such corporation; it shall be deemed to have surrendered the rights, privileges and franchises granted by any act of incorporation, or acquired under the laws of this State, and shall be adjudged to be dissolved;" and in 1 Rev. Stats. 604, sec. 4, it is provided that in the same cases the corporation "shall be deemed to be dissolved." This case is not brought within these sections. There is no allegation in the complaint, or finding by the referee, bringing the case within them. While the referee found that the company was insolvent at the time of the commencement of the action, he also found, upon sufficient evidence, that it had not been insolvent for one year prior thereto. He also found that it had not for one year neglected or refused to pay and discharge its obligations or suspend its ordinary and lawful business; and such finding is authorized by the evidence. It appears that the Tompkins judgment was recovered upon certain demand notes given by the company to certain of the stockholders for borrowed money; but it does not appear that payment of any of these notes had been demanded and the company thus put in default more than two months before the commencement of this action. A corporation cannot be said to have committed an act of bankruptcy or insolvency, or to have neglected or refused to pay and discharge its obligations, because its demand notes remain outstanding and unpaid, until payment has been demanded. The corporation continued to carry on its ordinary business until March 27, 1876—about eight months before the commencement of this action—when it executed the lease above mentioned for a term commencing April 1 of that year and ending February 1 of the next year, "unless sooner surrendered," as provided in the lease. The lessee by the terms of the lease was to carry on the business of manufacturing and selling cement, so that the brand of the company would be kept before the public. I do not understand that this company could not lawfully temporarily lease its property to some person who would carry on its business when it could not profitably do so. But whether the lease was lawful or not, it did not give the plaintiffs a standing in a court of equity to ask for a dissolution of the corporation.

There is no finding that the property of this company was not sufficient to pay all its debts. It was simply found that it was insolvent, and that may mean simply an inability to pay and discharge its obligations as they accrue in the ordinary course of its business. *Hazelton v. Allen*, 3 Allen, 114; *Brouwer v. Harbeck*, 9 N. Y. 589; *Ferry v. Bank of Cent. New York*, 15 How. Pr. 445. The plaintiffs gave evidence tending to show that the prop-

erty of the company was not equal in value to the amount of its debts; and the defendants gave evidence tending to show that there was property sufficient to pay all the debts and still leave the capital nearly or quite intact. What the precise truth as to the value of the property was, the referee did not determine and was not requested to determine, and hence we do not know. If the plaintiffs' claim be true, that there was not property sufficient to pay the debts, then they had no pecuniary interest in prosecuting this action, as they were not personally liable for the debts; and upon that ground they could have been well turned out of court. If the defendants' claim as to the value of the property be true, then certainly there could be no reason for depriving the corporation of its life and winding up its affairs. If the plaintiffs were not entitled to have the corporation dissolved, then they could not have a receiver appointed. There was no proof of any fraud or mismanagement or wrong-doing on the part of the directors. The statute (1 R. S. 601) provides that upon the dissolution of any corporation, unless other persons shall be appointed by the legislature or by some court of competent authority, the directors shall be the trustees for winding up its affairs. If there were no other objection to the appointment of a receiver, it would at least be discretionary with the court, in such a case as this, whether it would appoint a receiver or leave the affairs of the company in the hands of its directors. Assuming that this company was totally insolvent, so that it could never resume its ordinary business, the plaintiffs did not, in any aspect of the case, have an absolute right to a receiver. The court in its discretion might conclude that it was for the interests of all parties to permit the property to be sold under the judgments, or to be managed and controlled by the directors.

In the foregoing discussion I have not referred to the act (c. 151 of the Laws of 1870), "to regulate proceedings against corporations by injunction or otherwise," because corporations organized under the general manufacturing laws of the State are expressly excepted from the operation of that act. Neither have I referred to subdivision four of sec. 244 of the Code of Procedure, which provides that a receiver may be appointed "in the cases provided in this code, and by special statutes, when a corporation has been dissolved, or is insolvent, or in imminent danger of insolvency, or has forfeited its corporate rights." Under that section it must always be discretionary with the court whether a receiver shall be appointed or not, and that discretion will not ordinarily be subject to review in this court. But that section does not touch this case, as there is no provision in the Code, or by any special statute, for a receiver in such a case as this.

I am, therefore, of opinion that there is no error in the record before us which calls for the reversal of this judgment, and it should be affirmed, with costs.

All concur.

Judgment affirmed.

ATTORNEY-GENERAL *v.* TUDOR ICE CO.

IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS, MARCH
SESSION, 1870.

[*Reported in 104 Massachusetts Reports 239.*]

INFORMATION in equity by the Attorney-General, on behalf of the commonwealth, and at the relation of Richard Price, to restrain the defendants from engaging in or carrying on any business other than the cutting, storing, and selling of ice. Hearing on a motion for an injunction, before the chief justice, who reported the case as follows:

"The company was organized in 1861, under the Gen. Sts. c. 61, for the purpose of cutting, storing and selling ice. Its capital stock was fixed at \$360,000. It has carried on this business ever since, but has also carried on various other branches of business; has been in the habit of chartering vessels for the East Indies, loading them with ice so far as was proper, and completing the cargo by purchasing and exporting kerosene oil, tobacco, rosin and lumber; and has also imported merchandise of various kinds, including paddy, jute, linseed and tea. It has also erected buildings, and placed machinery in them, which cost about \$400,000. Some of the machinery is for the manufacture of tobacco, but the manufacture was discontinued about two years ago. Some of it is for cleaning rice, some for the manufacture of jute into gunny cloth, and some for the manufacture of linseed into oil. These branches of business it still carries on, and the capital invested in them is three or four times larger than its capital stock. The business is connected with the exportation of ice, and has increased the profits of the company, but does not appear to be necessary to its legitimate business. It has imported two cargoes of tea, worth \$300,000, which had no connection with the ice trade. It does not appear that any of the creditors of the company are in danger of losing by it, and there is no objection to its proceedings, except that they are not authorized by its act of incorporation and are alleged to be against public policy for that reason. I report

the case for determination upon the questions, whether this information in equity can be maintained, and, if it can be maintained, whether a temporary injunction ought to be issued, upon the facts above stated."

S. Bartlett for the Attorney-General.

C. B. Goodrich and *H. W. Paine* for the defendants.

GRAY, J. This court, sitting in equity, does not administer punishment or enforce forfeitures for transgressions of law; but its jurisdiction is limited to the protection of civil rights, and to cases in which full and adequate relief cannot be had on the common law side of this court or of the other courts of the commonwealth.

The Tudor Ice Company is a private trading corporation. It is not in any sense a trustee for public purposes. This is not a suit by a stockholder or a creditor. The acts complained of are not shown to have injured or endangered any rights of the public, or of any individual or other corporation; and cannot, upon any legal construction, be held to constitute a nuisance. It is expressly stated, in the report of the chief justice, that "it does not appear that any of the creditors of the company are in danger of losing by it, and there is no objection to its proceedings, except that they are not authorized by its act of incorporation and are alleged to be against public policy for that reason." No case is, therefore, made, upon which, according to the principles of equity jurisprudence and the practice of this court, an injunction should be issued upon an information in chancery.

In *Attorney-General v. Utica Insurance Co.*, 2 Johns. Ch. 371, Chancellor Kent, in a very able and elaborate judgment, after a thorough discussion of the question on principle, and an extensive examination of the earlier authorities, held that such an information could not be maintained to restrain an insurance company from exercising banking powers in violation of a statute of New York; but that the proper remedy was at law, by information in the nature of a *quo warranto*; and no appeal appears to have been taken from his decree. An information in the nature of a *quo warranto* was thereupon filed, and sustained by the Supreme Court of New York, and judgment rendered thereon that the corporation be ousted from the franchise which it had usurped. *People v. Utica Insurance Co.*, 15 Johns. 358. Similar proceedings may be had at law in this commonwealth in a proper case. *Goddard v. Smithett*, 3 Gray, 116, 122, 123; *Attorney-General v. Salem*, 103 Mass. 138; *Boston & Providence Railroad Co. v. Midland Railroad Co.*, 1 Gray, 340; Gen. Sts. c. 145, §§ 16-24.

One early English case of high authority, not cited by Chancellor Kent, nor at the argument of the present case, is so much in

point as to be worth quoting in full. Upon a bill in equity, filed by the Attorney-General, at the relation of several freemen of the Weavers' Co., against the officers of that company, setting forth "that the defendants had been guilty of many breaches and violations of their charters, and had oppressed the freemen, etc., and mentioned some particulars; and for a discovery of the rest, and that they might be decreed for the future to observe the charters, and to have an account of the revenue of the corporation which the defendants had misspent, etc., was the end of the bill. To which the defendants demurred, because, as to part of the bill, it was to subject them to prosecutions at law, and to a *quo warranto*; and as to the other parts, the plaintiffs had remedy by mandamus, information, or otherwise, and not here. And of the same opinion," the report proceeds, was Lord Cowper, "who said it would usurp too much on the King's bench; and that he never heard of any precedent for such a case as this; and so allowed the demurrer." Attorney-General *v.* Reynolds, 1 Eq. Cas. Ab. (3d ed.) 131.

The modern English cases, cited in support of this information, were of suits against public bodies or officers exceeding the powers conferred upon them by law, or against corporations vested with the power of eminent domain and doing acts which were deemed inconsistent with rights of the public.

Some of them were cases of misapplication of funds raised by taxation and held by municipal corporations or officers upon specific public trusts. Such were Attorney-General *v.* Norwich, 16 Sim. 225; Attorney-General *v.* Guardians of Poor of Southampton, 17 Sim. 6; Attorney-General *v.* Andrews, 2 Macn. & Gord. 225.

The hypothetical case, in which Lord Westbury, in Stockport District Waterworks *v.* Manchester, 9 Jur. (N. S.) 266, said that he should "probably not hesitate" to act upon the information of the Attorney-General, was of a suit to restrain the making of a contract between an aqueduct corporation and a city to carry water beyond the limits which the city was authorized by law to supply.

The passages cited from Liverpool *v.* Chorley Water Works Co., 2 De Gex, Macn. & Gord. 852, 860, and Ware *v.* Regent's Canal Co., 3 De Gex & Jones, 212, 228, were but *dicta* that an unauthorized diversion of water or flowing of land by an aqueduct or canal corporation, without proof of actual or imminent injury to property, gave no right of suit to an individual, and could only be checked on an application to the court by the Attorney-General.

The case of Attorney-General *v.* Great Northern Railway Co., 4 De Gex & Smale, 75, was a clear case of nuisance, the unlawful obstruction of a public highway by a railroad. That of Attorney-General *v.* Oxford, Worcester & Wolverhampton Railway Co.,

2 Weekly Rep. 330, was the case of the opening of a railway line in violation of an order which an authorized public board had made upon the ground that it would be unsafe to the public.

The single case in which an information has been sustained in an English court of chancery against a corporation for carrying on a business beyond its corporate powers, is *Attorney-General v. Great Northern Railway Co.*, 1 Drewry & Smale, 154, in which Vice-Chancellor Kindersley in 1860 restrained a railway company from trading in coal in large quantities, upon the ground that there was danger that, if allowed to go on, it might get into its hands the coal trade of the whole district from or through which its railway ran, and thus acquire a monopoly injurious to the public. That case is evidently the foundation of the *dictum* of Vice-Chancellor Wood, two years later, in *Hare v. London & Northwestern Railway Co.*, 2 Johns. & Hem. 80, 111.

In *Attorney-General v. Mid Kent Railway Co.*, Law Rep. 3 Ch. 100, a mandatory injunction was granted upon the information of the Attorney-General to compel a railway company to construct a bridge over a public road, and with as gradual a slope as was required by a special clause in its charter; and the objection that the Attorney-General might have had an equal and complete remedy at law was stated by each of the lords justices as if it required no answer and afforded no ground for refusing to entertain jurisdiction in equity. It is often said in the English books that the King or his Attorney-General, suing in behalf of the public, has the election to sue in either of his courts, and may therefore enforce a legal right in the court of chancery. 1 Dan. Ch. Pract. (3d Am. ed.) 6, 7; *Attorney-General v. Galway*, 1 Molloy, 95, 103// However that may be, by our statutes the general equity jurisdiction of this court is limited to cases where there is no plain, adequate, and complete remedy at law, as well in suits by the commonwealth as in those brought by private persons. Gen. Stat. c. 113, § 2; *Commonwealth v. Smith*, 10 Allen, 448; *Clouston v. Shearer*, 99 Mass. 209, 211, and other cases there cited. The 38th of the former rules in chancery of this court (14 Gray, 360) by which the court adopted, as the outlines of its practice, the practice of the high court of chancery in England, so far as the same was not repugnant to the Constitution and laws of the commonwealth, nor to those or such other rules as the court might from time to time make, cannot enlarge the jurisdiction of this court as defined by statute, and has been repealed by the new rules recently established. Rules of 1870, *post*, 555.

The only cases in which informations in equity in the name of the Attorney-General have been sustained by this court are of

two classes. The one is of public nuisances, which affect or endanger the public safety or convenience, and require immediate judicial interposition, like obstructions of highways or navigable waters. *District Attorney v. Lynn & Boston Railroad Co.*, 16 Gray, 242; *Attorney-General v. Cambridge*, *ib.* 247; *Attorney-General v. Boston Wharf Co.*, 12 Gray, 553; *Rowe v. Granite Bridge Co.*, 21 Pick. 344, 347. The other is of trusts for charitable purposes, where the beneficiaries are so numerous and indefinite that the breach of trust cannot be effectively redressed except by suit in behalf of the public. *County Attorney v. May*, 5 Cush. 336; *Jackson v. Phillips*, 14 Allen, 539, 579; *Attorney-General v. Garrison*, 101 Mass. 223; Gen. Stat. c. 14, § 20. If there are any other cases to which this form of remedy is appropriate, that of a private trading corporation (whose proceedings are not shown to have injured or endangered any public or private rights, and are objected to solely upon the ground that they are not authorized by its act of incorporation, and are therefore against public policy) is not one of them.

Information dismissed.

DONWORTH *et al.* v. COOLBAUGH *et al.*, APPELLANTS.

IN THE SUPREME COURT OF IOWA, DECEMBER 10, 1857.

[*Reported in 5 Iowa Reports 300.*]

1264.62 THE plaintiffs recovered judgment against the Fairfield & Mt. Pleasant Plank-Road Co. for one thousand two hundred and thirty-four dollars and sixty-two cents, on the 17th of October, 1853, on warrants or orders drawn on the treasurer of the company, by C. Negus, as president of the same, and countersigned by Wm. E. Groff, as secretary. An execution, issued on this judgment, was returned, the officer certifying that he had demanded property of said Negus, as such president, and that he had failed to show any.

The plaintiff seeks to subject the individual property of the stockholders to the payment of his judgment, and to that end, on the 10th of October, 1856, served a notice on the company, in its corporate name, to show cause why the individual property of the members of the company should not be made liable. At the November term, 1856, a default was taken, and the court heard the cause, and found several matters specially, namely: That the

former judgment was recovered; that an execution issued, and was returned "no property found;" that the company was organized in the spring of 1851, under the act of February 22, 1847 (Stat. 1847, p. 101); that each share in the company was fifty dollars; and the court then finds the truth of the contents of a schedule, which sets forth the names of persons who were stockholders—the number of shares subscribed by each—the amount of each subscriber—the amount called in—the amount unpaid—and the whole amount of unpaid stock due from each stockholder. The court further finds that the debts for which the judgment was recovered were contracted after the company was duly organized, and after the subscription of the aforesaid stock; and that there is no corporate property to satisfy the judgment. Thereupon a judgment was rendered, that the individual property of the members of the company, to the amount of stock subscribed by each, and not yet paid, be subjected to the payment of said judgment; and it was ordered that execution issue, to be levied upon the private property of the members to the amount of stock subscribed by each, and not yet paid, as above found by the court.

Upon this judgment an execution was issued, reciting the foregoing matters and setting forth the names of the members, the subscriptions, the amounts paid, and the amounts unpaid. This judgment and execution each embrace the names of some one hundred and seventy individuals and firms; of these, twenty-five have joined in this appeal. The errors assigned are:

1. In rendering judgment for execution against the individual property without notice to, and petition against, such individuals, and without assessment by a jury, or jury trial, and without a day in court.

2. In ordering execution for the entire unpaid balance of stock.

3. In ordering an execution against separate individuals by name, for distinct and separate sums.

4. In ordering individual liability against the members at all; and in this, that they cannot be made liable as such, in law.

David Rorer for the appellants.

Starr & Phelps for the appellees.

WOODWARD, J. This is a proceeding under the general incorporation act of 1847 (statutes of 1847, p. 101), passed under the first Constitution of the State, to subject the private property of the stockholders to the debts of the company. The Fairfield & Mt. Pleasant Plank-Road Co. was organized in the spring of the year 1851, under the above-named general act. In 1853 a judgment was recovered against the company, and there being no corporate property, the plaintiffs seek to make their debt of the members.

The general tenor of the defendants' objections to this proceeding is of a higher character than the above. They maintain that the act of 1847, under which the company organized, having been repealed, the liability is gone, and that a remedy cannot be found in the Code against these defendants, as members of a company which organized under the prior law.¹

7. We cannot concur in that position of the defendants which maintains that the repeal of the act of 1847 took away the liability. We should not hold that this destroyed the corporation—that it took away all its rights, by causing it to cease as a body corporate, nor, therefore, that its obligations, or those of its members, were blotted out. The act of 1847, with the articles adopted by a company organizing under it, constituted its charter; and they were, in relation to it, the same as a charter granted by the General Assembly, and the repeal of the act was but a repeal of it as a rule of future organizations, but not a repeal as to the past. This was a private corporation, and its existence could no more be taken away by the repeal of the general law than could that of one incorporated by private act, in which there was no provisions to that effect, by the repeal of such act. The corporation still existed under that act, and that was the law of its existence.

This would seem to be the necessary construction, upon principle, in order to avoid an infringement upon well-established rules, in relation to private corporations and private rights; but the last section of c. 43 of the Code, which is the general incorporation act, and which went into force July 1, 1851, seems to conclude this question, by providing that "nothing herein contained is intended to affect the interests of companies already organized, further than is above expressed." In this chapter it is enacted that corporations already existing may bring themselves under the provisions of the Code, by taking certain steps for that purpose, and manifesting that design. But this company did not take any steps to bring itself under the Law of 1851, and, therefore, it continued under that of 1847, and this is the law by which it is to be judged.

The judgment of the District Court is reversed, and the cause is remanded for further proceedings.

¹Only so much of the opinion is given as relates to this question.—Ed.

UNITED HEBREW BENEVOLENT ASSOCIATION v.
JOSHUA BENSHIMOL.

IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS, FEBRUARY
10, 1881.

[*Reported in 130 Massachusetts Reports 325.*]

CONTRACT by a charitable corporation to recover of a member of the corporation five years' dues and interest. Trial in the Superior Court, without a jury, before Putnam, J., who found the following facts:

The plaintiff was duly organized, on February 5, 1867, under the Gen. Sts. c. 32. The objects of the association are to raise funds for the purpose of granting "temporary relief to poor and helpless Israelites." Its constitution provides that "any Israelite desiring to become a member can apply or be proposed to the board of direction by paying one dollar admittance fee; and, when declared elected, can, after signing the constitution and by-laws, vote at all meetings held by the association, and be eligible to the various offices;" and that "every member must pay five dollars yearly in advance, as dues to the association." Its funds are derived from dues assessed upon the members, in conformity with its constitution, and from donations. The dues are the main and only fixed resources, and the expenditures of the association are made in reliance upon the dues.

The defendant was elected a member of the corporation in 1869, and paid his admission fee of \$1.00 and \$5.00, which was assessed upon him for that year, and continued to pay \$5.00 each year for dues up to May, 1875, since which time he has made no payments. The defendant never signed the constitution and by-laws, but it was not customary for members to do so; and such signing by a member was never insisted upon by the corporation as a prerequisite to his being allowed to exercise all the privileges of a member.

Each year there has been expended by the corporation an amount equal to or greater than the aggregate amount of the dues of members for that year. The dues not paid had been demanded of the defendant from time to time up to the bringing of this action.

The defendant contended that he was never a member of the association; and that the payments made by him were only voluntary contributions on his part. But the judge found that he was a member, and was entitled to all the rights and privileges of a member; that the payments made by him were payments of his

annual dues as such member; and that he had never resigned his membership.

The defendant also contended, and asked the judge to rule, that, as the St. of 1874, c. 375, repealed the Gen. Sts. c. 32, the plaintiff had no longer any legal existence as a corporation, and could not maintain this action; and that, even if he was a member, he was under no legal obligation to pay these dues, and so the plaintiff could not recover.

The judge declined so to rule; ruled that the defendant, being a member of the corporation, was legally bound by an implied promise to pay the dues provided for by the constitution and by-laws, and that his liability rested on a good consideration; and found for the plaintiff. The defendant alleged exceptions.

G. F. Piper for the defendant.

L. D. Brandeis for the plaintiff.

COLT, J. The corporation was organized under the Gen. Sts. c. 32, which provides that seven or more persons associating by agreement in writing, for educational, charitable, or religious purposes, and complying with its requirements, should become a body corporate. This chapter was repealed by the St. of 1874, c. 375, which, so far as relates to the creation of such corporations, substantially re-enacts its provisions, and was declared by an act of the following year not to have been intended to affect corporations existing under previous laws. St. 1875, c. 49, sec. 2.

R. It is contended that as the St. of 1874 contained no reservation, it operated to destroy all corporations created under the provisions of the General Statutes; and that the explanatory declaration in the statute of the next year could not restore their rights.¹ But it is plain that the St. of 1874 was not passed for the purpose of affecting the rights of corporations already organized. The repeal of a general corporation law cannot be construed, in the absence of express provisions, as intended to repeal the charters of corporations formed under it, especially where the manifest purpose of the repealing act is to substitute a new law, extending the provisions of the old, and perfecting its details, but not changing its general policy. It is a familiar rule of construction, that when statutes are repealed by acts which substantially retain the provisions of the old laws, the latter are held not to have been destroyed or interrupted in their binding force. "In practical operation and effect they are rather to be considered as a continuance and modification of old laws, than as an abrogation of those old and the re-enactment of new ones." Shaw, C. J., in *Wright v. Oakley*, 5 Met. 400, 406. *Steamship Co. v. Joliffe*, 2 Wall. 450,

¹ Only so much of the opinion is given as relates to this question.—Ed.

459. The existence of the plaintiff corporation was not affected by the St. of 1874.

There was no error in the rulings given, or in the refusal to rule as requested.

Exceptions overruled.

JAMES W. RICE AND ANOTHER v. NATIONAL BANK OF
THE COMMONWEALTH AND OTHERS.

IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS, FEBRUARY
26, 1879.

[Reported in 126 Massachusetts Reports 300.]

INFORMATION, in the nature of a *quo warranto*, filed, by order of court and consent of parties, on November 26, 1877, and containing the following allegations:

That on April 3, 1876, all the property which Ezra D. Winslow had on February 14, 1876, was conveyed and assigned to the relators as his assignees in bankruptcy.

That on said February 14 Winslow owned certain property situated in Boston, of the value of \$100,000, being the newspapers known as the *Boston Post* and the *Boston Statesman*, with the good-will and bills receivable of the same, and all and singular the stock, types, presses, and materials used in publishing the same, and the Associated Press privilege connected therewith; also the types, presses, stock, and materials connected with a job-printing office in said Boston, by Winslow conducted in connection with said papers; also the library, fixtures, and all other property connected with and belonging to said papers and job office.

That on May 14, 1875, Ezra D. Winslow, Edward F. Porter, and William C. Greene falsely and fraudulently assumed to associate and form a corporation under the laws of this commonwealth, under the name of the Boston Post Company, for the pretended purpose of publishing and printing papers, and job printing, with a pretended capital stock of \$300,000; but no such association was ever made in fact, no capital stock was ever paid in to said assumed corporation, and no such corporation was legally formed, though Winslow, Porter, and Greene complied with all the forms prescribed by the statutes of this commonwealth for the organization of corporations, and a certificate of organization was obtained from the secretary of the commonwealth, in the form prescribed by the Stat. of 1870, c. 224, § 11,

certifying that "E. D. Winslow, Edward F. Porter, and W. C. Greene, their associates and successors, are legally organized and established as, and are hereby made, an existing corporation under the name of the Boston Post Company, with the powers, rights, and privileges, and subject to the limitations, duties, and restrictions which by law appertain thereto."

That Winslow, Greene, and Porter did not associate themselves together with the intention to constitute a corporation for the purpose of "the printing and publishing of newspapers and job printing," as in their article of association alleged; but that said association (if any was formed) was for the purpose of enabling Winslow to cheat and defraud the public and such persons as he might be able to induce to purchase stock in said assumed corporation; that said assumed corporation was conceived in fraud, and that said association was not for the real purpose of forming a corporation under the laws of this commonwealth, but was a fraud and a sham entered into for the real purpose of defrauding such persons as might be induced to become creditors of or stockholders in the same; that any certificate of corporate existence, or grant of corporate powers, which Winslow, Greene, and Porter may have obtained, was obtained by fraud, and was of no legal force or validity, and Greene, Winslow, and Porter never became a corporation under the laws of the commonwealth.

That about February 1, 1876, Winslow absconded from the United States, and is now in Europe, a fugitive from justice, and Porter and Greene had long before that time ceased to act or claim to act, or to exercise or claim to exercise any corporate franchise, under the name of the Boston Post Company.

That Greene and Porter were mere nominal parties to said assumed association, having no real interest therein whatever; that Greene was the attorney of Winslow, and whatever part he took in the assumed association was as the attorney of and for the benefit of Winslow; that Porter was not in any way interested in the assumed association, and only acted therein at the request and for the sole benefit of Winslow.

// That no stock was ever legally issued in said assumed Boston Post Company, but that said assumed corporation was a fraud and a sham, and no persons ever became legal stockholders in any legal company under that name; that up to the time Winslow absconded he was in the possession of all the property above described, using and treating it as his own; and immediately upon his leaving the United States, and before the appointment of the relators as his assignees, certain corporations and persons named, claiming to be stockholders in said corporation assumed to have been formed by Winslow, Porter, and Greene, and to exercise a

fraud

corporate franchise by them claimed to have been obtained under the laws of the commonwealth by Winslow, Greene, and Porter, took possession of all said property previously held by Winslow, // and held and managed the same under the name and style of the Boston Post Company, and assumed to exercise a corporate franchise as said company; that they thus held and managed said property, and refused to deliver the same to the relators, on demand, till the same was sold and the proceeds, amounting to \$60,000, placed in the hands of a trustee to be disposed of as should be adjudged upon proper legal proceedings to determine the title thereto; that said parties now claim to own said proceeds in the hands of such trustee, as said corporation under the name of the Boston Post Company, and have commenced legal proceedings to obtain the same, contending that Winslow, Porter, and Greene obtained a certificate of organization from the secretary of the commonwealth, which has the force and effect of a special charter, and is conclusive evidence of their organization and of the existence of said Boston Post Company as a corporation.

That no such corporation as the Boston Post Company was ever legally formed, no capital stock was ever paid in, and neither Winslow, Porter, and Greene, nor any persons claiming to be their successors or assigns, ever had any right to exercise a corporate franchise as the Boston Post Company for the purpose of taking property, doing business, prosecuting or defending suits at law or in equity, or any other purpose whatever under the laws of this commonwealth; that if the defendants are the assignees of stock in said assumed corporation, they took the same from Winslow for such value and under such circumstances as should have put them upon inquiry as to the legal character and status of the assumed company, and are not in law protected in the enjoyment of said franchise any more than the original parties to said fraudulent association.

The prayer of the information was that due process of law might issue, commanding the defendants to answer by what warrant they claimed to have the said franchise; that they might be restrained from exercising such franchise; and that the Attorney-General might be notified of the filing and pendency of the information.

The Attorney-General, having been notified, did not intervene. The defendants demurred to the information, assigning as cause of demurrer that the allegations of the information were not sufficient in law to entitle the relators to the relief sought.

Ames, J., sustained the demurrer, and dismissed the information. The relators alleged exceptions.

J. H. Benton, Jr., for the relators.

H. D. Hyde, C. H. Drew and M. Storey for the defendants.

GRAY, Ch. J. At common law private individuals, without the intervention of the Attorney-General, cannot, either as of right or by leave of court, file an information in the nature of a *quo warranto*. *Goddard v. Smithett*, 3 Gray, 116. The statutes give the right to file such an information only to "any person whose private right or interest has been injured or is put in hazard by the exercise by any private corporation, or persons claiming to be a private corporation, of a franchise or privilege not conferred by law;" and provide that, where an information so filed is sustained, if the Attorney-General has not intervened, no judgment of forfeiture shall be entered, but only judgment that the corporation, or the persons claiming to be a corporation, be perpetually excluded from the franchise or privilege exercised by them and not conferred by law. Gen. Stat. c. 145, §§ 16, 22.

This information seeks to exclude the defendants from exercising the franchise of being a corporation on the ground that any certificate of corporate existence, or grant of corporate powers, which the persons who undertook to form the corporation obtained, was obtained by fraud. But it shows that those persons complied with all the forms prescribed by the statutes of the commonwealth for the organization of corporations, and obtained from the secretary of the commonwealth a certificate under the seal of the commonwealth, which by the express terms of the general statute of 1870, c. 224, § 11, "shall have the force and effect of a special charter, and be conclusive evidence of the organization and establishment of such corporation."

R. It thus appears on the face of the information that the franchise of being a corporation was conferred upon the defendants by law. The defendants having thus once become a legal corporation, their franchise, by the general principles of law, as well as by the provisions of the statute under which the information is filed, could be avoided, annulled, revoked, or forfeited only by the legislature, or at the suit of the commonwealth or of the Attorney-General representing the commonwealth, and not upon the application of private individuals. Gen. Stat. c. 68, § 41; *Commonwealth v. Union Ins. Co.*, 5 Mass. 230; *Charles River Bridge v. Warren Bridge*, 7 Pick. 344, 371; *Folger v. Columbian Ins. Co.*, 99 Mass. 267, 274; *Hastings v. Amherst & Belchertown Railroad*, 9 Cush. 596, 599; *Goddard v. Smithett*, 3 Gray, 117. As this reason is conclusive, it is unnecessary to consider other objections to the maintenance of the information.¹

Exceptions overruled.

¹ In the absence of express conditions in an act of incorporation, by which corporate rights and powers are made to depend on their due exercise, a

IN THE MATTER OF THE APPLICATION OF THE NEW
YORK AND LONG ISLAND BRIDGE COMPANY,
RESPONDENT, v. LENOX SMITH, APPELLANT, *et al.*

IN THE COURT OF APPEALS OF NEW YORK, FEBRUARY 25, 1896.

[*Reported in 148 New York Reports 540.*]

APPEAL by the defendant Lenox Smith in condemnation proceedings, from an order of the General Term in the first judicial department, made November 15, 1895, affirming an order appointing commissioners of appraisal, entered on the direction of the court upon the decision of a referee, in favor of the petitioner and against the defendant, after a trial of the issues.

This special proceeding was begun on March 18, 1895; the defendant Smith answered, and the defendant Skelly neither answered nor appeared at the trial.

The premises belonging to defendant Lenox Smith, and for the appropriation of which this proceeding was brought, are situated on the easterly side of Third avenue, in the city of New

non-user or misuser of them does not operate as a surrender or forfeiture of the charter. Although the disuse of the canal and its abandonment by the corporation may be a gross disregard of the duty imposed on them by law, and an essential violation of the terms and conditions implied from the contract entered into with the Government by the acceptance of the charter, and upon due proceedings had might be a sufficient ground upon which to decree a forfeiture of all their corporate rights and privileges, they do not constitute any valid ground upon which the exercise by the corporation of any of the powers conferred by their charter can be defeated or denied by third persons in collateral proceedings. This results from the very nature of an act of incorporation. It is not a contract between the corporate body, on the one hand, and individuals whose rights and interests may be affected by the exercise of its powers, on the other. It is a compact between the corporation and the government from which they derive their powers. Individuals therefore cannot take it upon themselves in the assertion of private rights to insist on breaches of the contract by the corporation as a ground for resisting or denying the exercise of a corporate power. That can be done only by the government with which the contract was made, and in proceedings duly instituted against the corporation. It would not only be a great anomaly to allow persons not parties to a contract to insist on its breach and enforce a penalty for its violation; but it would be against public policy, and lead to confusion of rights, if corporate powers and privileges could be disputed and defeated by every person who might be aggrieved by their exercise. Therefore it has been often held that a cause of forfeiture, however great, cannot be taken advantage of or enforced against corporations collaterally or incidentally, or in any other mode than by a direct proceeding for that object in behalf of the Government. *Angell & Ames on Corp.* § 777, and cases cited; *Boston Glass Manufactory v. Langdon*, 24 Pick. 49; *Quincy Canal v. Newcomb*, 7 Met. 276.—*Bigelow, J., Heard v. Talbot*, 7 Gray, 113, 119-120.—*Ed.*

York, beginning fifty feet north of Sixty-fourth Street, and having a frontage of seventy-five feet on Third Avenue, and a depth of one hundred and five feet.

The "New York and Long Island Bridge Company" was incorporated by c. 395, Laws of 1867, entitled "An Act to incorporate the 'New York and Long Island Bridge Company' for the purpose of constructing and maintaining a bridge over the East River between the city of New York and Long Island."

This act was amended by the following acts, viz.: Chapter 437, Laws of 1871; c. 426, Laws of 1879; c. 392, Laws of 1885; c. 411, Laws of 1892, and c. 212, Laws of 1894.

Further facts are stated in the opinion.

De Lancey Nicoll for appellant.

Julien T. Davies and *William J. Kelley* for respondent.

BARTLETT, J. The main question presented by this appeal is whether the New York and Long Island Bridge Company was, at the time this proceeding was instituted, an existing corporation duly authorized to acquire title to the land of the defendant Smith, for the purposes of constructing the bridge and its approaches.

The learned counsel for the appellant rests his attack upon the corporate existence on various distinct grounds, and a proper consideration of them involves a full examination of the legislation under which the bridge company claims the right to maintain this proceeding.

The appellant takes a preliminary point which, if sound, would require a reversal of the order appealed from, and a dismissal of this proceeding.

ad, / The act incorporating the bridge company (c. 395, Laws of 1867) provides in the twelfth section thereof that the bridge shall be commenced within two years from the passage of the act, and shall be continued without unreasonable delay, until it is completed, "or this act and all rights and privileges granted hereby shall be null and void."

It is the contention of appellant's counsel that this forfeiture clause is self-executing, and as it is admitted that the work was not commenced within two years from the passage of the act, the bridge company, *ipso facto*, ceased to exist.

We are referred to a large number of authorities as sustaining this position, and, among others, to several cases in this court.

It is to be observed that the question as to whether a forfeiture clause is or is not self-executing, depends wholly upon the language employed by the legislature.

Our attention is called particularly to *In re Brooklyn, Winfield & Newtown Ry. Co.*, 72 N. Y. 245, and *Brooklyn Steam Transit Co. v. City of Brooklyn*, 78 N. Y. 524.

In the first case the words of forfeiture were, "Its corporate existence and powers shall cease," and this court held that upon default the corporation's existence and powers ceased, without judicial proceedings. In the second case the words of forfeiture were, "This act and all the powers, rights, and franchises herein and hereby granted shall be deemed forfeited and terminated," and this court held the clause to be self-executing, thereby recognizing the undoubted power of the legislature to provide that corporate existence shall cease by the mere fact of failure of the corporation to perform certain acts imposed by the charter.

It requires, however, strong and unmistakable language, such as each of the cases referred to presents, to authorize the court to hold that it was the intention of the legislature to dispense with judicial proceedings on the intervention of the Attorney-General.

In the case at bar the words of forfeiture are, "All rights and privileges granted hereby shall be null and void."

It cannot be said that the words "shall be null and void" disclose the legislative intent to make this clause self-executing. The words "null and void," as used in this connection, clearly mean voidable. The word "void" is often used in an unlimited sense, implying an act of no effect, a nullity *ab initio* (*Inskeep v. Lecony*, 1 N. J. L. 112); in the case at bar it was not so employed, but rather in its more limited meaning.

We think these words mean no more than if the legislature had said, in case of default the corporation "shall be dissolved." The Attorney-General was authorized to treat the charter of the bridge company as voidable, and by appropriate legal proceedings to have terminated its corporate existence.

The Supreme Court of the United States, in passing upon the meaning of the words "void and of no effect," uses this language: "But these words are often used in statutes and legal documents, . . . in the sense of voidable merely, that is, capable of being avoided, and not as meaning that the act or transaction is absolutely a nullity, as if it never had existed, incapable of giving rise to any rights or obligations under any circumstances. *Ewell v. Daggs*, 108 U. S. 148."

Holding, as we do, that the forfeiture clause in the act of 1867 was not self-executing, we find in the various acts amending the act of 1867 repeated waivers by the legislature of the failure of the bridge company to begin its work within two years from the passage of the act of 1867.

The act of 1871 (c. 437) provides that the company shall proceed within two years to construct the bridge, and must complete it before the 1st of June, 1879.

The act of 1879 (c. 426) provides that the bridge should be

commenced within two years from the passage of the act, and be completed by the first day of June, 1885.

The act of 1885 (c. 392) provides that work should commence before May 30, 1888, and continue with all due diligence to completion.

The act of 1892 (c. 411) provides that work should begin before March 3, 1893, and be completed before the 3d day of March, 1900.

It may be well enough to state at this point that among the questions of fact passed upon by the referee in this proceeding were these two, viz. :

Did the bridge company begin work under the act of 1885, before May 30, 1888?

Did it begin work under the act of 1892, before March 3, 1893?

The learned referee answered both of these questions in the affirmative, and the General Term refused to disturb these findings.

We are satisfied, from an inspection of the record, that the findings are supported by evidence.

It therefore follows, the point is not well taken that the bridge company, by reason of failure to commence work upon the bridge in due season, has ceased to be a living, existing corporation.

The next point made by the appellant brings up for consideration the most important question presented by this appeal. It is insisted that the act of 1892 (c. 411), under which this proceeding is instituted, violates article 3, sec. 16, of the Constitution, in that its subject is not expressed in its title.¹

The order appealed from should be affirmed, with costs.

All concur, except Gray, J., who dissents upon the ground that the act of 1892 violates sec. 16 of article 3 of the Constitution of the State, which provides that "no private or local bill which may be passed by the legislature shall embrace more than one subject, and that shall be expressed in the title." The subjects of this law are too interwoven to make separation possible, without substituting for the law intended by the legislature one it might not have been willing to pass.

Order affirmed.

¹So much of the opinion as relates to this question has been omitted.—
Ed.

THE FLINT & FENTONVILLE PLANK-ROAD COMPANY v. GEORGE S. WOODHULL.

IN THE SUPREME COURT OF MICHIGAN, APRIL 30, 1872.

[Reported in 25 Michigan Reports 99.]

ERROR to Genesee Circuit.

O. F. Wisner and *G. V. N. Lothrop* for plaintiff in error.

M. E. Crofoot and *C. I. Walker* for defendant in error.

COOLEY, J. The legislature of 1848 passed an act incorporating the Flint & Fentonville Plank-Road Company, with power to lay out, establish, and construct a plank-road, and all necessary buildings, from the village of Flint to the village of Fentonville. The act was to remain in force for sixty years from and after its passage, but the fourth section provided that "the legislature may at any time alter, amend, or repeal this act by a vote of two-thirds of each branch thereof; but such alteration, amendment, or repeal shall not be made within thirty years of the passage of this act, unless it shall be made to appear to the legislature that there has been a violation by the company of some of the provisions of this act." The fifth section made the general plank-road act of 1848 a part of this special charter. Laws 1848, p. 404.

The incorporators appear to have organized under their charter, and to have constructed the road provided for by it, a part of which they now keep up and maintain. In 1871 the legislature passed an act to repeal this charter. This act is very brief, has no preamble, contains no recitals, and simply declares that the act first above named "be and the same is hereby repealed." Sess. L. 1871, vol. 3, p. 167. No notice was given to the company or to any of its officers of the intention to adopt or to propose any such repeal, or to enter upon any investigation of a violation by the company of any of the provisions of its charter; neither the journals of the legislature, nor the files or records in the office of the Secretary of State, show that any such investigation was ever had, nor is it claimed or suggested that there is evidence anywhere that any tribunal, legislative or judicial, has passed upon the question of such a violation, and adjudged it to have taken place, unless the repealing act itself affords such evidence. The company denies the validity of this act, and the defendant, having treated it as valid, and acted upon it adversely to their interests, an issue has been made, which is now before us for decision.

It is not disputed on the part of the defendant that the charter of a private corporation is to be regarded as a contract, whose provisions are binding upon the State, and cannot be set aside

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at the will of the legislature. Such a charter is a law, but it is also something more than a law, in that it contains stipulations which are terms of compact between the State as the one party and the corporators as the other, which neither party is at liberty to disregard or repudiate, and which are as much removed from the modifying and controlling power of legislation as would be the contracts of private parties. But the defendant insists that the repealing act in this case is one contemplated and justified by the contract itself; and no attempt is made to defend it, except upon what the defendant regards as a just construction of the original charter. The positions taken by the defendant may be succinctly stated as follows:

1. The legislature had a right to repeal the charter whenever the fact should be made to appear that a violation of the charter had taken place.

2. The inquiry into the fact of violation would be an inquiry for the purpose of enabling the legislature to exercise its legitimate powers, and would, therefore, be legislative in character, and might be entered in any manner and through any channels the legislative wisdom might devise or see fit to employ, untrammelled by any of the rules which govern the action of judicial tribunals.

3. The repealing act is not only of itself a determination that the violation of charter has taken place, but it is evidence, also, that the legislature has first informed itself of the facts; and no court or other authority is at liberty to assume that it has acted improvidently or without due inquiry.

4. But, although all presumptions favor the legislative action, it is conceded that the parties concerned are entitled to a judicial investigation afterward, and upon an issue properly framed for that purpose, may show the act invalid by establishing the fact that no violation of the charter has taken place, and that the legislature must have acted under mistake or in misapprehension of the facts.

The first of these positions must be conceded. The right of the legislature to repeal, when it was properly made to appear that a breach of the charter had taken place, cannot be questioned.

The second will be equally indisputable, if the main point be established, that the inquiry to determine the violation of the charter is legislative in character. The legislature will not only choose its own modes of collecting information to guide its legislative discretion, but from due courtesy to a co-ordinate department of the government, we must assume that those methods were the suitable and proper ones, and that they led to correct results. And if the record show no investigation, we must still

presume the proper information was obtained; for we must not suppose the legislature to have acted improperly, unadvisedly, or from any other than public motives, under any circumstances, when acting within the limits of its authority. *Baltimore v. State*, 15 Md. 376; *Lusher v. Scites*, 4 W. Va. 11; *People v. Draper*, 15 N. Y. 545, 555; *Wright v. Defrees*, 8 Ind. 302; *Ex parte McCordle*, 7 Wal. 514; *Bradshaw v. Omaha*, 1 Neb. 16; *Humboldt Co. v. Churchill Co. Com'rs*, 6 Nev. 30.

The third point must also be conceded to this extent; that a legislative act, not violative of any constitutional principle, must be its own sufficient and conclusive evidence, when assailed, of the justice, propriety, and policy of its passage. We ourselves acted upon this principle in *People v. Mahaney*, 13 Mich. 484, and it is not disputed anywhere so far as we are aware.

But there lies at the basis of all these propositions the question whether the determination that the charter has been violated is in truth legislative in character. The defendant affirms that it is; the plaintiff insists that it is properly and essentially judicial. This point decided one way, disposes of the case; decided the other, it is followed by others of a difficult and somewhat delicate nature, which would necessarily be considered before a conclusion could be reached on the merits.

Now it must be conceded that if the act in question is not judicial in character, it is at least strikingly analogous. There is a question which is or may be disputed, there are adverse parties, there are private interests involved, there is evidence to be received, there is the fact to be found, there is punishment to be inflicted, there is a forfeiture to be enforced. Legislative action does not often, to say the least, include all, or many, of these elements. It may affect private rights incidentally, but it does not often proceed to pass directly upon the controversies between the State and individuals. In some cases the legislature has judicial power, because it is incident and essential to the discharge of legislative functions. Such is its power to determine upon the election and qualification of its members, and the power to punish for contempts of its authority. In these cases it is entitled to all the presumptions which support the action of courts, and having no authority set over it to review its determinations, they must be accepted everywhere as correct and conclusive. *People v. Mahaney*, 13 Mich. 481; *Anderson v. Dunn*, 6 Wheat. 204; *Hiss v. Bartlett*, 3 Gray, 468; *Burnham v. Morrissey*, 14 Gray, 226; *State v. Matthews*, 37 N. H. 450; *State v. Jarrett*, 17 Md. 309; *Lamb v. Lynd*, 44 Penn. St. 336. But every judgment must have something preceding it to put the judicial body in motion; the sentence, by any authority pronounced, however august or power-

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ful, will be a mere idle fulmination if there was no *lis mota* to base it upon. The order of a legislative body for the punishment of an individual would be merely idle and void, unless somewhere in the record there appeared a cause alleged which subjected him to its jurisdiction for such punishment.

It is conceded in the present case that the fact of corporate abuse was to be found before the charter could be taken away. The repealing act, however, is only a sentence. It inflicts the penalty of corporate death, without in any way declaring or intimating, except by the penalty, that the corporation has been found worthy of death. It is precisely such an act as might have been passed had the legislative power been unlimited and untrammelled. The legislature had power to repeal for cause, and was prohibited from repealing without cause; it repeals, expressing no cause, and it is said the cause must be inferred. Then comes what is to have the effect of a punishment, though it does not purport to be such, and only on its face appears to be the withdrawal of a privilege; and yet, as there was a right assured and no mere privilege to be withdrawn, it is supposed we must infer, *first*, that a punishment was designed, and then, from the punishment infer the guilt, the accusation, the trial, and the conviction. Having thus assumed the conclusion to begin with, we must next, from the conclusion, assume that the premises existed to deduce it from. This is certainly much more than can be assumed in support of the action of any court. In the courts there must at least be an accusation and a condemnation before there can be the infliction of any penalty. To infer cause where none is assigned, in the taking away of private rights, is to take up and adopt the arguments in favor of the arbitrary arrests under the command of Charles I. His warrants assigned no cause, and, therefore, it was argued, sufficient cause must be presumed. If this repealing act is good as a judgment of abuse of corporate privileges, then Sir Nicholas Hyde was correct in holding that he could not release on *habeas corpus* the parties committed to prison by the special command of the King for refusing to submit to his illegal exactions. The King had power to order a committal for cause; no cause was expressed; therefore a sufficient cause was to be assumed. Darnel's Case, 3 State Trials, 1; Broom's Const. L. 162.

The defendant refers to certain cases in support of his positions, of which the *Miner's Bank v. The United States*, Morris, 482; S. C., 1 Greene, Iowa, 553, goes to the full extent of holding that such a legislative act is not only valid, but is conclusive that cause existed for its passage. This case, however, stands alone, and was not very much insisted upon on the argument. The cases of

Crease v. Babcock, 23 Pick. 334, and Erie & N. E. R. R. Co. v. Casey, 26 Penn. St. 287, are more relied upon as laying down the correct rule. The Pennsylvania case is most directly in point, and as it appears to have been carefully considered, the conclusion is entitled to great respect, notwithstanding those eminent jurists, Lewis, Ch. J., and Woodward, J., dissented. In that case the corporation was protected by a clause in its charter similar to the one under consideration here, and the legislature had thought proper to act upon it by repealing the charter without any preliminary judicial investigation. In stating the position assumed in support of the repealing act, Black, J., says: "For the defendant it is insisted that the repealing act is itself not only evidence, but conclusive evidence, that the company had previously committed some abuse or misuse which justified the repeal. No case has been cited which denies this doctrine in terms; and it was held for the true rule by the Supreme Courts of Iowa (1 Greene, 561) and of New York (19 Barb. 81). But I do not see clearly the principle on which it can stand. A legislative body in a matter like this is known to proceed without formal notice, without specific accusation, and without opportunity to answer. There is no confronting of the parties with the witnesses, nor anything that can be called a hearing or trial. It would, therefore, seem unjust to hold that a legislative act is, like a judicial sentence, conclusive of every fact which ought to have been found before it was passed. It might more plausibly be likened to an award made by an umpire to whom both parties have agreed that the subject should be referred." "For myself," he says, "I incline to the opinion that, when the constitutional power of the legislature to pass a law depends on matter of fact, the party to be affected by it ought to have an opportunity afterward of showing how the fact is." E. & N. E. R. R. Co. v. Casey, 26 Penn. St. 316.

Having thus expressed the opinion that legislative conclusions on questions of fact were subject to review in the courts, the learned judge goes further, and proceeds to lay down rules for the legislative guidance in determining the causes which are to justify the legislature in acting at all. The legislature is not to judge finally for itself what is abuse or misuse of corporate privileges by a company; but,

1. The illegal act must be *positive*. A mere omission, like the failure of a bank to make its annual returns, is not enough.
2. A disregard of the charter, which is injurious only to *private* interests, and which, therefore, admits of *private* compensation, is not, he thinks, within the fair meaning of the words. It must be some conduct which infringes upon a right reserved by a State for the benefit of the public.

3. It must be *wilful*; that is, not involuntary, accidental, or the consequence of mere mistake of fact.

4. It must not be the mere transgression of the act of incorporation by a subordinate officer, or agent without authority, express or implied, from the board of directors. *Ibid.*, p. 319.

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Thus the majority of the Supreme Court of Pennsylvania lays down the rules of law which are to control the legislature in the exercise of its legislative authority, and at the same time declares the right of the court to review the conclusions of the legislative body in matters of fact. With great respect for that eminent tribunal, we are unable to understand why this is not a setting of the court above the legislature as an appellate tribunal in matters both of law and of fact, in a manner which wholly ignores the division of powers in the Constitution, and is quite inconsistent with the harmonious operation of the machinery of government. It is not consistent with legislative independence and dignity that the courts should assert a right to sit in judgment upon legislative action, or to attribute to the legislature erroneous or oppressive conduct in the exercise of any of its proper and legitimate functions. These two departments of the government being co-ordinate, and neither of them occupying a position subordinate to the other, the conclusions of each must be accepted by the other as proceeding from good motives, and as warranted by the proper information. It could only be productive of endless discord and confusion, not to say of jealousies and conflicts of authority, if the legislature was to review and set aside the judgments of the courts, or the courts to allow parties to appeal to them from the conclusions the legislature had reached, in determining upon the propriety of passing or declining to pass a proposed law. Careful endeavor has been made to prevent any such jealousies and conflicts when, in framing our Constitutions, a line of distinction has been drawn between legislative and judicial functions, and the departments to which these functions respectively have been confided have been entrusted with no power to pass that line. It is, therefore, in the highest degree impertinent and obtrusive, when either department undertakes to advise the other that in the exercise of its proper functions it has acted unwisely and indiscreetly; has misjudged the facts or perverted the law; and its action must be still more offensive if it entertains the appeal of parties from the decisions of the other, when acting within a province which was set apart to be peculiarly under its jurisdiction and control.

Moreover, there is, in the nature of the case, and the difference in the manner in which legislative and judicial functions are performed, reason sufficient to demonstrate the impossibility of a proper review by the one department of the decisions the other

has made. Legislators have a right to act upon their own knowledge and observation, upon hearsay, upon information derived from the public press, upon the *ex parte* petitions of interested parties, upon anything, in short, which satisfies their judgment; and public opinion is one of the most important facts to be considered in determining upon the propriety or advisability of a proposed law. Even an unreasonable prejudice, if general or widespread, may sometimes very properly be a controlling consideration when the case is such that to the enforcement of the law a strong supporting public sentiment would be a necessity. But these are things the courts must not allow to influence their action. With them the question must be simply, *first*, what is the law; and *second*, what are the facts; and the facts they must reach through inflexible rules of evidence laid down for their guidance. A review of a legislative determination by the courts would, therefore, not only be highly indecorous and objectionable for the reasons already stated, but it would be eminently improper also, for the further reason that it could not possibly be had upon the same evidence. It is wholly foreign to any proper administration of law or justice that the decision of the proper authority upon any subject should be liable to review by another tribunal, which in such review is shut off from the sources of information to which the other had access. So far, therefore, from the different ways the legislature and the judiciary have of reaching the facts being a reason why the latter should give parties who have been decided against by the former a rehearing, they constitute with us a very conclusive reason for holding that those cases in which there is a hearing to be had on questions of private right and private property are, and must in their very nature be, regarded as exclusively of judicial cognizance. *Different ways of reaching evidence*

But there are still further reasons why the doctrine declared in the Pennsylvania case cannot, we think, be sound. That doctrine is—to state it more fully—that, though the legislature may repeal the corporate charter, on the ground of abuse or misuse, thereby taking away from the corporators the franchise of greater or less property value, yet the legislative decision is only *prima facie* correct, and the parties are entitled to have it set aside in the courts afterward, on showing by evidence that they have not been guilty of such abuse or misuse. In other words, the legislative act, which may perhaps be passed without any notice, is to stand as a conviction of guilt until the parties charged can prove their innocence. But their innocence of what? In other cases it would be thought the grossest perversion of right and justice if, in any proceeding in court, the party was to be presumed guilty of any one specific charge until he proved himself innocent; but that

case would be a much less serious departure from the rules of justice than this. The general plank-road act of 1848 was made a part of this company's charter, and it contained a great many provisions to be observed by it, and for a violation of some of them specific penalties were imposed. The company has been in operation upward of twenty years, when its franchise is taken away on a presumption of guilt, which is only to be removed by the corporators proving that in all that time they have observed every provision of their charter, and been guilty of no default. It is safe to say that what is required of them is, and would be, in any such case, a simple impossibility. It is as if an individual should be charged generally, and without further specification, with an offense against the criminal laws, and the trial court should say to him: "You are charged, and *prima facie* convicted, of crime, but you shall be relieved of the conviction on making proof that you have never disobeyed the law. Meantime, and until you do so, the State will take from you your property, in punishment for your presumed guilt."

Now it is simply impossible that any doctrine which leads to such results can be sound. But the illustrations of its anomalous and unjust character might be multiplied indefinitely; and if it were possible for the question of corporate default to be fairly tried under it, it must be remembered, also, that as the question would or might arise between individuals and the company, as it has in this instance, there might be repeated trials of the same question, none of which would be conclusive in a new suit. The question involved in each suit would be the validity of a statute, dependent upon the facts, and therefore to be submitted to a jury; and while the jury in one cause might hold it valid, another in a different case, acting upon somewhat different evidence, or influenced by more persuasive advocates, might declare it void; and thus it would be a law to-day as to one party, and no law to-morrow as to another; and so on indefinitely, according to the varying views which different panels of jurymen might take of disputed facts; until, perhaps, the State would be compelled to interfere by *quo warranto*, and have, after all these proceedings, the authoritative adjudication which sound policy, not less than correct principle, demanded at the beginning. // But we need hardly say that a law, if valid at all, must be valid from its enactment, and cannot be made to depend upon the opinion of a jury as to the sufficiency of the reasons for its being passed.

We are constrained, therefore, from all these considerations to say that the determination whether a corporation has violated its charter is judicial in its nature. It requires the action of those tribunals which must hear before they condemn, and must proceed

upon inquiry. If it were properly legislative, it may be that the legislature must be presumed to have given a hearing; but the fact, as we have seen in this case, is otherwise, and the cases in which presumptions are to be indulged against the facts ought not to be multiplied. It is sufficient to say that, in our opinion, the case is one in which the party is entitled to a trial of right *in fact*, and cannot be put off with one which rests exclusively in a presumption of law, indulged against the fact. The violation of the charter cannot be legally made to appear, except on trial in a tribunal whose course of proceeding is devised for the determination of questions of this nature.

We think this the fair construction of that clause of the charter which is in question. It is not to be presumed that the legislature designed to take upon itself judicial powers; and as the act does not necessarily require that construction, it should not be given it. We must suppose that an inquiry in some proper form was contemplated, by means of which and on fair trial it should be made to appear to the legislature that a cause existed justifying repeal. Any other view renders the stipulation worthless as a protection; but this view protects the interests of corporators, and at the same time enables the legislature to exercise its power of taking away the charter, even though the violation of corporate duty might not be of that serious character which would seem to justify declaring a forfeiture on judicial proceedings instituted independent of this clause. The repealing act, it must be assumed, was passed through inadvertence, and probably under the impression that the charter, like many others in this State, was subject to repeal in the legislative discretion.

This being our view, it follows that the judgment of the Circuit Court must be reversed, with costs, and a new trial granted.

Christiancy, Ch. J., and Campbell, J., concurred.

Graves, J., did not sit in this case.

THE STATE OF OHIO ON RELATION OF LYMAN S.
COLBURN *v.* THE OBERLIN BUILDING AND
LOAN ASSOCIATION.

IN THE SUPREME COURT OF OHIO, DECEMBER TERM, 1879.

[*Reported in 35 Ohio Reports 258.*]

ON May 24, 1878, the Attorney-General filed in this court an information, on the relation of Lyman S. Colburn, praying that a judgment of ouster be pronounced against the defendant, the

Oberlin Building and Loan Association, a corporation under the laws of this State. It is averred in the information that the defendant has forfeited its rights, privileges, and franchises as a corporation in various specified particulars.

An answer and a reply were filed, and the case was heard on the pleadings, an agreed statement of facts, and certain testimony.

Colburn is a member of the corporation, and was formerly a director.

The association has never received deposits.

Isaiah Pillars, Attorney-General, and *N. L. Johnson* for the plaintiff.

I. A. Webster and *George K. Nash* for defendant.

OKEY, J. Several questions of practical importance are involved in this case. They will be disposed of with as much brevity as the nature of the case will permit. But, in order that they may be understood, it will be necessary to extract from the voluminous record a statement of the facts.

On January 1, 1871, the defendant was organized and commenced business as a corporation, under the act of May 5, 1868, amended May 9, 1868 (65 Ohio L. 137, 173; S. & S. 194, 195), in relation to building and loan associations. The act, as amended, provides, among other things, as follows:

"Sec. 1. That any number of persons not less than five may associate together and become a corporation . . . for the purpose of raising moneys to be loaned among the members . . . for use in buying lots or houses, or in building or repairing houses, or other purposes."

"Sec. 2. Such corporation shall be authorized and empowered to levy, assess, and collect from its members such sums of money, by rates of stated dues, fines, interest on loans advanced, and premiums bid by members . . . for the right of precedence in taking loans, as the corporation by its by-laws shall adopt; also to acquire, hold, encumber, and convey all such real estate and personal property as may be legitimately pledged to it on such loans, or may otherwise be transferred to it in the due course of such business, provided that the dues, fines, and premiums so paid by members, . . . although paid in addition to the legal rate of interest on loans taken by them, shall not be construed to make the loans so taken usurious, and provided, also, that no person shall hold more than twenty shares in any such association in his own right."

"Sec. 5. That so much of the earnings as may be necessary, not exceeding ten per cent. per annum, may be set apart to defray the current expenses of said association, and for the purchase of

such real estate as may be necessary for the convenient transaction of its business, and the residue of said earnings shall be transferred to the credit of the shareholders; and when said shares are fully paid, then to be paid ratably to the shareholders." See Rev. Stats., §§ 3833-3836.

The corporation has made no loan to any member since December 1, 1876, nor has it offered to make such loan by calling for bidders, as required by the by-laws. On April 1, 1877, P. G. Akers, a member of the corporation, applied to the directors for the purpose of obtaining a loan on four shares of stock; but the directors were not inclined to grant the request, and he accepted from them an offer of \$104 per share, and transferred the stock to the association, which is admitted to have been a good bargain on its behalf.

A by-law of the corporation, adopted September 1, 1873, provides that the directors shall determine the lowest amount of premium that will be received on loans. The directors have constantly acted in pursuance of that by-law, but have changed such minimum rate from time to time. Members sometimes bid below the premium so fixed, but the directors refuse to accept the bids.

At a meeting of the association, on June 20, 1877, a resolution was adopted, providing that as often as there is sufficient money in the treasury to divide the sum of ten dollars each to the uncanceled shares, such division shall be made, each share to be charged at the rate of ten per cent. per annum for such dividend. Five distributions were made pursuant to that resolution, amounting in the aggregate to \$10,296 in cash. In addition, certain securities, hereinafter mentioned, were also distributed. But the construction given to the resolution was that the distribution should be confined to stockholders who had not taken out money on their shares.

From May 6, 1873, to March 8, 1877, the association procured at the First National Bank of Oberlin discount of twenty-two notes, amounting to \$14,814.48, made by the officers of the association and others, some of them payable in thirty days, others in sixty days, and the others in ninety days. The rate of interest was ten per cent. per annum, which was usually deducted at the date of the note. Some of the notes were given in renewal of former loans. One of them, dated October 1, 1875, was given for thirty-five shares of stock in the corporation, purchased by the directors for the association. The other sums were borrowed by the corporation for the purpose of lending the same. The shares above mentioned, and others, were purchased by the company, so as to transfer them to persons not members, who desired to obtain loans of the association.

On July 1, 1877, eight members of the association held shares of stock in excess of the number to which they were limited by statute. These shares number in the aggregate two hundred and ninety-two. Loans were made on all these shares except eighty-one. In the same year the association compromised with three of those members holding sixty-eight of such shares in excess.

From June 1, 1874, until January 1, 1878, the association compromised and settled with nine other members, whose shares were not in excess of the number to which they were limited by statute. The number of these shares was eighty-eight.

With respect to such compromises, the following appears in the answer: "Respondent says that in several instances it has, in consideration of certain of its stockholders cancelling their stock, discharged the obligations which it held against such stockholders as collateral security for certain loans which they had previously made from respondent, and upon the further consideration that such members first pay to respondent the present worth of the money so borrowed by them, and for which they gave such obligations, mortgages, etc."

Settlements were based on the assumed fact that the association would run one hundred months from the beginning, that is, that when that period is reached it can pay \$200 per share, according to the original intention. Repeated calculations showed that to be the probable duration of the company.

Where securities were taken in making settlements, they were distributed among the members in the same manner as the funds on hand, already mentioned, were distributed. The amount of securities so received and distributed was \$4843.8.

On this state of facts our conclusions are as follows:

1. That the association has abused its corporate powers in several particulars, admits of no doubt. It has refused to loan its funds to its members, and it has established such rules and regulations, and so conducted its business by dividing its funds and otherwise, as to prevent the loan of its funds to a member, under the system of competitive bidding contemplated in the statute, and provided for in the by-laws of the company. It has, indeed, loaned its funds, in many instances, to persons who were not members of the association. The illegality of such a course is clearly stated in *State ex rel. v. Greenville Building and Saving Association*, 29 Ohio St. 92.

2. Again, the association has been in the habit of borrowing money for the purpose of lending it. We do not deny that corporations possess the power to borrow money which may be needed in the transaction of their necessary business; but these transactions fall

within no such principle. The money to be loaned by associations like this, if, as here, deposits are not received, can only be properly accumulated in the manner contemplated by the statute—that is, by dues, fines, premiums, and interest; and the acts complained of, and fully proved by the testimony, cannot be readily distinguished from the business of a banker. They are clearly illegal.

2 Equally illegal was the act of dividing the money and securities among certain stockholders. It was opposed to the principle upon which such associations are organized. It was, indeed, even if it had been done with perfect impartiality, a plain violation of the statute, which contemplates that no such division shall be made until “said shares are fully paid.”

Finally, it was illegal for the association to traffic in shares of its own stock. We do not deny that a corporation has power to receive shares of its stock as security for a debt or other similar purpose; but here the association purchased its own shares of stock, in several instances, for the purpose of disposing of them to persons not intending to become members of the association, with a view of making such shares the basis of loans to such persons. The law will not uphold such transactions.

2. The association compromised with several of its members, and released them from further obligation to the corporation, as well on account of indebtedness for loans as on subscription. We have examined the evidence, and we do not find there was any want of good faith in these transactions. The interest of the stockholders, as well as the public, seems to have been kept in view. Of course, without this such acts could not be upheld; but we are not able to find in the statute any inhibition of the power to make such compromises, and, on the fullest consideration, we unite in holding that the power exists.

3. Where a corporation has been guilty of acts which, by statute, are made a cause of forfeiture of its franchise to be a corporation, this court has no discretion to refuse such judgment. State *ex rel. v. Penn. & O. Canal Co.*, 23 Ohio St. 121. But, in other cases, we are vested with discretion to determine whether judgment of ouster of the franchise to be a corporation shall be rendered, or whether the corporation shall be ousted from the exercise of the powers illegally assumed. With some hesitation, a majority of the court have reached the conclusion that it will be for the interest of the stockholders, as well as the public, that we should render the latter instead of the former judgment. The evidence satisfies us that if the corporation is permitted to wind up its affairs, the work will be accomplished in a few months; but if the association should be ousted from its franchise to be a corporation, we would be required to appoint trustees under the

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act of 1878 (75 Ohio L. 817, § 22; Rev. Stats., § 6781), and this would occasion delay and involve increased expense. Accordingly, the corporation will be ousted from the exercise of the powers referred to in the first paragraph of the syllabus and from the power of permitting any member to hold in his own right more than twenty shares of stock, but not from its franchise to be a corporation, nor from the exercise of the power referred to in the second paragraph of the syllabus.

GILMORE, Ch. J. I dissent only as to the judgment entered. Such flagrant and persistent violations of corporate powers and duties, as are shown in this case, in my opinion, call for and require an application of the severest penalties of the law. The judgment should oust the defendant from being a corporation.

Judgment of ouster as to specified powers.

THE PEOPLE OF THE STATE OF NEW YORK, RESPOND-
ENT, v. THE ULSTER & DELAWARE RAILROAD
CO., APPELLANT.

IN THE COURT OF APPEALS OF NEW YORK, OCTOBER 6, 1891.

[*Reported in 128 New York Reports 240.*]

APPEAL from judgment of the General Term of the Supreme Court in the Third Judicial Department, entered upon an order made the fourth Tuesday of November, 1890, which affirmed a judgment in favor of defendant entered upon a verdict directed by the court.

Also appeal from order of said General Term, made the fourth Tuesday of November, 1890, which reversed an order of Special Term granting an extra allowance.¹

The nature of the action and the facts, so far as material, are stated in the opinion.

E. Countryman for appellant.

George Zabriskie for respondent.

RUGER, Ch. J. This action was brought in the name of the people by the Attorney-General to determine the corporate existence of the defendant, upon the alleged ground that it had forfeited its charter through a failure to build a portion of the railroad track which its predecessor was authorized to construct. The Rondout & Oswego Railroad Co. was organized in 1866, under

¹So much of the opinion as relates to this question has been omitted.—
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the General Railroad Act, to build, operate, and maintain a railroad from Rondout, in Ulster County, to the village of Oneonta, in the County of Otsego; and, during the period of its existence, actually built a road from Rondout to Stamford, but failed to build that portion extending from Stamford to Oneonta. The defendant, the Ulster & Delaware Railroad Co., through a plan of reorganization adopted by the bondholders under c. 430 of the Laws of 1874, on the sale of the property of the railroad under a mortgage foreclosure in 1875 succeeded to the rights, property, and franchises of the original company. It was for the failure of the defendant to complete the railroad originally projected by the Rondout & Oswego Co. that this action was brought. The action is claimed to have been authorized by the provisions of section 1798 of the Code of Civil Procedure, providing that an action may, by leave of court, be brought by the Attorney-General, to procure a judgment annulling the existence of a corporation created under the laws of this State, when, among other things, it "has violated any provision of law whereby it has forfeited its charter, or become liable to be dissolved by the abuse of its powers, or forfeited its privileges or franchises by a failure to exercise its powers."

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A violation of the provisions of this section apparently creates a cause of forfeiture and contemplates a punishment to be inflicted upon the offender, and not a benefit to be recovered by the prosecutor. No absolute right to enforce a forfeiture for the causes specified is conferred upon any party, but it is made to depend upon certain conditions. The statute does not execute itself, but requires the action of the Attorney-General to make it effective. Even the wilful neglect of a railroad corporation to exercise all its franchises does not, of itself, terminate its corporate existence; but, to effect that result, the State, through its Attorney-General, must not only elect to enforce the forfeitures, but also procure leave from the court to bring an action for that purpose. Code of Civil Procedure, § 1798; *People v. A. & V. R. R. Co.*, 24 N. Y. 261; *People v. N. R. Sugar Refining Co.*, 121 *id.* 582.

Such actions are not even then maintainable, except some public interest is involved which requires the exercise of the franchise by the corporation. *People v. N. R. Sugar Refining Co.*, *supra*.

It was, therefore, incumbent upon the State to show upon the trial of the action that a cause of forfeiture had not only been incurred by the defendant, but that it continued to exist, and that its existence involved some public interest, and also that the court had authorized the bringing of the action. An action thus commenced is, even then, necessarily always within the control of the State, as the sole party interested, to prosecute or abandon at its

mere will and pleasure. *People v. Phoenix Bank*, 24 Wend. 431.

R. ' It is responsible to no one for the exercise of its discretion in this respect, and can, through the action of its legislature, not only discontinue an action brought by it, but can also repeal or confirm charters; waive or abolish causes of forfeiture; release rights of action, and limit the operation of its statutes upon individuals and corporations at its own will. By enforcing the forfeiture of corporate existence, the State receives no benefit and acquires no property, and by waiving such forfeiture it loses no privilege and interferes with no vested right. Having the absolute power at will to take the corporate life, it does not hamper its freedom of action by forbidding its servants in specified cases from prosecuting actions for forfeiture. "It requires no exercise of judicial power to enable it to waive a forfeiture, but it may be effectuated by the mere expression of its will, and its will may be based upon cause or utterly without one. Having absolute power as the supreme representative of the people in respect to the question, it may do so with or without cause, or upon whatever terms or conditions it may see fit to impose.

It is claimed by the defendant that the State, by the enactment of c. 236 of the Laws of 1889, amending c. 430 of the Laws of 1874, has so changed the original statute that a reorganized railroad corporation no longer incurs the risk of forfeiting its charter, when the railroad commissioners certify that no public interest is involved in the completion of a road as originally projected.

act 1889 The act is as follows: "Nothing herein contained shall be construed to compel a corporation organized under this act to extend its road beyond the portion thereof constructed at the time said corporation acquired title to such railroad property and franchise, provided the board of railroad commissioners shall certify that, in their opinion, the public interests, under all the circumstances, do not require such extension. If said board shall so certify and shall file in their office such certificate, . . . said corporation shall not be deemed to have incurred any obligation so to extend its road, and such certificate shall be a bar to any proceedings to compel it to make such extension, or to annul its existence for failure so to do, and shall be final and conclusive in all courts and proceedings whatever."

✓ ~ By this enactment the State has indicated in the most imperative form its will in respect to such actions. It thereby declared that the certificate of the railroad commissioners to the effect that no public interests were involved should thereafter be a conclusive answer to any attempt to annul the existence of a reorganized railroad corporation for a failure to make an extension of its road. By this act the State devolved upon the railroad commissioners the

duty previously performed by its Attorney-General, of inquiring whether the public interests required it to enforce an alleged forfeiture against a reorganized railroad corporation, and necessarily thereby deprived other departments of the government of the power of determining the preliminary question upon which the action of the State in instituting and prosecuting such actions must be founded.

By leaving to another department of the State the determination of a question upon which its own action was thereafter to be controlled, it neither delegated legislative power to, or conferred judicial functions upon, such department. It simply instituted an *ex parte* inquiry to determine its own future action, as had been the uniform practice of the State government for many previous years. The question whether the public interests are involved is always a condition precedent to the right of maintaining any action by the Attorney-General for the forfeiture of corporate rights, and the State by this act says that it will hereafter leave this question in certain cases to the railroad commissioners to determine, instead of to the Attorney-General, by whom it had theretofore been decided. In other words, it has made the railroad commissioners' certificate conclusive evidence of the non-existence of any sufficient ground of forfeiture. After the filing of such certificate the law prescribing a forfeiture of its charter by a reorganized railroad company for an omission to build an extension of its road, ceases to operate thereon and practically abolishes the penalty which the act of 1874 imposed in certain cases. This does not give to the act a retro-active operation; but there being no clause in the act of 1889 saving pending prosecutions or existing rights from the effect of the statute, by settled rules the abolition of the penalties left all actions in which judgments had not been obtained subject to the rule created by the amended statute alone. *Nash v. White's Bank of Buffalo*, 105 N. Y. 243.

We are of the opinion, therefore, that the certificate of the railroad commissioners filed under the act of 1889, to the effect that no public interest required the extension of the defendant's railroad, was a bar to this action.

The judgment and order appealed from should both be affirmed with costs.

All concur.

Judgment and order affirmed.

THE PEOPLE OF THE STATE OF NEW YORK, RESPOND-
ENT, *v.* THE NORTH RIVER SUGAR REFINING CO.,
APPELLANT.

IN THE COURT OF APPEALS OF NEW YORK, JUNE 24, 1890.

[*Reported in 121 New York Reports 582.*]

APPEAL from judgment of the General Term of the Supreme Court in the First Judicial Department, entered upon an order made November 7, 1889, which affirmed a judgment in favor of plaintiff entered upon a verdict directed by the trial court, and affirmed an order denying a motion for a new trial.

This action was brought by the Attorney-General to have the defendant "dissolved, its charter vacated, and its corporate existence annulled."

The complaint alleged, and it was found, that defendant is a corporation organized under the General Manufacturing Act; that it, together with other corporations and firms, in violation of law and in abuse of its powers became a party to and carried out an agreement which was set forth as follows:

"DEED.

"THE SUGAR REFINERIES COMPANY.

"The undersigned, namely: Havemeyers & Elder, The Decastro & Donner Sugar Refining Co., F. O. Matthiessen & Weichers Sugar Refining Co., Havemeyer Sugar Refining Co., Brooklyn Sugar Refining Co., the firm of Dick & Meyer, the firm of Moller, Sierck & Co., North River Sugar Refining Co., the firm of Oxnard Brothers, The Standard Sugar Refinery, The Bay State Sugar Refinery, The Boston Sugar Refining Co., The Continental Sugar Refinery, and The Revere Sugar Refinery, for the purpose of forming the board hereinafter provided for, and for the other purposes hereinafter set forth, enter into the following agreement:

"NAME.

"The board herein provided for shall be designated by the name of The Sugar Refineries Co.

"OBJECTS.

"The objects of this agreement are:

"1. To promote economy of administration and to reduce the cost of refining, thus enabling the price of sugar to be kept as low as is consistent with reasonable profit.

"2. To give to each refinery the benefit of all appliances and

processes known or used by the others, and useful to improve the quality and diminish the cost of refined sugar.

"3. To furnish protection against unlawful combinations of labor.

"4. To protect against inducements to lower the standard of refined sugars.

"5. Generally to promote the interests of the parties hereto in all lawful and suitable ways.

"BOARD.

"The parties hereto who are not corporations shall become such before this deed takes effect.

"Each corporation subscribing hereto agrees, and the parties hereto who are not corporations agree as to the corporations which they are to form, that all the shares of the capital stock of all such corporations shall be transferred to a board, consisting of eleven persons, which may be increased to thirteen by vote of a majority of the members of the entire board, and two additional members to belong respectively to the first and second classes hereinafter provided for.

"Any member of the board may be removed by vote of two-thirds of the members of the entire board in case of incapacity or neglect or refusal to serve.

"Any member may resign by filing written notice of his resignation with the secretary of said board.

"Vacancies during the term of office of members shall be filled by appointment by vote of the majority of the members of the entire board.

"A member appointed to fill a vacancy shall hold office until the expiration of the term of the member in whose place he is appointed, which new appointee shall succeed to all the rights, duties, and obligations of his predecessor under this deed.

"Vacancies by expiration of office shall be filled at the annual meeting of the holders of certificates herein provided for, or at such other times as shall be prescribed by the board.

"Such annual meetings shall be held in the city of New York, in the month of June, and notice shall be given to each certificate holder of record of every meeting of certificate-holders, by mailing to him, at least seven days before said meeting, a notice of the time, place, and objects of such meeting. Holders of certificates shall vote according to the number of shares for which they hold certificates. They may vote by proxy.

"The board may make by-laws. All arrangements for meetings, elections and all details not herein specifically provided for, shall be made by the board. A member of the board may act by

proxy for any other member with like effect as if he were present and acting.

"A majority of the members of the board shall constitute a quorum for the transaction of business. The action of the board meeting, by a majority vote of such meeting, shall have the same effect as the unanimous action of the board, except as herein otherwise provided, and that to authorize the appropriation of money, bonds, or shares shall require the assent, either written or expressed, by vote at a board meeting, of at least a majority of the members of the entire board.

"No member of the board shall, during the time that he holds office, buy or sell sugar or be interested directly or indirectly in the purchase or sale of sugar, whether for the purpose of speculation or otherwise, without a vote of a majority of the members of the entire board. For any violation of this provision he may be removed as a member of the board, and shall be liable to account for all profits which shall be realized by him to the board for the *pro rata* benefit of the certificate-holders.

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"As it is desirable that the board shall consist of members who are largely interested in the properties and the business contemplated, it is hereby agreed that all members of the board shall be free to join in or become parties to agreements and transactions which the several boards of directors hereinafter referred to, or this board may arrange, to the same extent and in the same manner and with the like effect as if they were not members of the board.

"This board may transfer, from time to time, to such persons as it may be desired to constitute trustees, or directors, or other officers of corporations, so many of the shares as may be necessary for that purpose, to be held by them subject to the provisions of this instrument. Such transfers may be executed by the president and treasurer of the board in behalf of and as attorneys for the board for that purpose, and to be re-transferred when so requested by the board.

"The first board shall consist of the persons hereinafter mentioned; they shall hold office as follows, and until their successors shall be elected:

"*Members of the first class.* Harry O. Havemeyer, F. O. Matthiessen, John E. Searles, Jr., Julius A. Stursberg; to hold office seven years.

"*Members of the second class.* Theodore A. Havemeyer, Joseph B. Thomas, John Jurgensen, Hector C. Havemeyer; to hold office five years.

"*Members of the third class.* Charles H. Senff, William Dick; to hold office three years.

"At the expiration of the terms of the third class, and of each successive class, their successors as members of such class shall be elected for seven years.

“ OFFICERS.

“The board shall appoint from its members a president, vice-president, and treasurer, and it shall also appoint a secretary, who may or may not be a member of the board. The board may, from time to time, create other offices, and appoint the persons to fill them. It may appoint committees. It shall designate the duties and prescribe the powers of the several officers and committees.

“ PLANS.

"The several corporations, parties to this agreement, shall maintain their separate organizations, and each shall carry on and conduct its own business.

"The capital stock of each corporation shall be transferred to the board, and in lieu of the same, certificates not exceeding \$50,000,000, divided into 500,000 shares, each of \$100, shall be issued by the board and distributed as hereinafter provided.

"The certificates shall be in the following form:

“No. _____). (Shares. _____)

“(Shares one hundred dollars each.)

"THE SUGAR REFINERIES COMPANY.

“ This is to certify that _____ is entitled
to _____ shares of the Sugar Refineries Co.
“ _____

"This certificate is issued under and subject to the provisions of a deed dated the 16th day of August, 1887.

The shares represented by this certificate are transferable by the holder and his personal representatives in person or by attorney, upon the books of the board and not otherwise, and only upon the surrender of this certificate.

“They entitle the holder to the rights, and are subject to the provisions mentioned in the deed.

The interest of the holder is in the proportion of the number of shares represented by this certificate to the entire number of shares outstanding. The total amount represented by outstanding certificates and the terms of the deed may be changed from time to time by a majority in interest as therein provided.

“In witness whereof, the board has caused this certificate to be signed by its president and treasurer and the seal of the board to be affixed hereto, the _____ day of _____ 188 .

“ For value received
transfer, and set over unto

resented by the within certificate, and do hereby
constitute and appoint attorney irrevocable
for and in name and stead to transfer
the said shares upon the books kept for the purpose under the
direction of the within board.

“ ‘ The assignee, by accepting this transfer, assents to the terms
of the deed referred to in the certificates as the same shall be
changed from time to time.

“ ‘ Witness my hand and seal this day of
188 .’

“ TITLE.

“ The shares of the capital stock of the several corporations to
be transferred to the board as herein provided shall be transferred
to the names of the board as trustees, to be held by them and by
their successors as members of the board strictly as joint tenants.

“ By the death, resignation, or removal of any member of the
board, the whole title shall remain in the others. All members
ceasing to be such shall execute such instrument as may be nec-
essary, if any, to keep the title vested in the persons who from
time to time shall be members of the board.

“ The board shall hold the stock transferred to it with all the
rights and powers incident to stockholders in the several corpora-
tions, and subject only to the purposes set forth in this deed.

“ DIVISION OF INTEREST.

“ The several corporations shall be entitled to the shares in the
following proportions of the \$50,000,000, viz. :

“ Havemeyers & Elder.

“ Decastro & Donner Sugar Refining Co.

“ F. O. Matthiessen & Weichers Sugar Refining Co.

“ The Havemeyer Sugar Refining Co.

“ The Brooklyn Sugar Refining Co.

“ Dick & Meyer.

“ Moller, Sierck & Co.

“ Oxnard Brothers.

“ North River Sugar Refining Co.

“ Standard Sugar Refinery.

“ Boston Sugar Refining Co.

“ Bay State Sugar Refinery.

“ Continental Sugar Refinery.

“ Revere Sugar Refinery.

“ Each refinery and the corporation to which it belongs shall
be freed from liability and indebtedness by the parties interested
in it; or such parties, if the board shall approve, may provide in

cash for such indebtedness or liability, leaving the same to stand at the pleasure of the board, except that the employees' contracts shown in the schedules hereto annexed, and the contracts with Havemeyers & Elder and the F. O. Matthiessen & Weichers Sugar Refining Co., and the Bay State Sugar Refinery, pending for improvements and enlargements, shall continue as liabilities.

"Annexed hereto are schedules in general terms of the properties of the several refineries. The properties are guaranteed to correspond with the schedule by the parties interested therein, who are to make good any deficiency. On the complete execution of this agreement each of the said parties shall make a full inventory of the property not embraced in such schedules, and useful for the conduct of the business, on hand or contracted for, including raw and refined sugars, molasses, sugars in process, syrups, bone-black, fuel, barrels, packages, charcoal, and other supplies; and such inventory is to be examined, and the articles appraised at their present cash value (except as to sugar and molasses to arrive, which are to be appraised at their market value on arrival) by a committee of five persons, as follows:

"Theodore A. Havemeyer.

"F. O. Matthiessen.

"Julius A. Stursberg.

"John E. Searles, Jr.

"Joseph B. Thomas.

"The value of such property as fixed by four-fifths of the appraisers shall be paid for in cash by the said board to the treasurer of each corporation.

"Bone-black may at the option of the board be paid for in cash or in bonds hereinafter provided for or in certificates at a rate for bonds or certificates to be fixed by vote of a majority of the members of the entire board.

"The property shall remain with the refinery where it is to be used by it, except as such refinery shall make a different disposition of it.

"In consideration of the transfer of their stock to the board, the board shall also pay to Havemeyers & Elder the sum of _____ to the F. O. Matthiessen & Weichers Sugar Refining Co., the sum of _____ and to the Bay State Sugar Refining Co. the sum of _____ on account of payments already made on pending contracts for improvements and enlargements.

"Additional shares to the amount of \$400,000, less 15 per cent. to be left with the board as hereinafter provided, shall be received by Moller, Sierck & Co. for improvements and enlargement of capacity of their refinery now in progress, when said im-

provements are completed and the increased capacity demonstrated.

"The shares assigned to the several refineries shall be distributed by them to and among the parties interested therein.

"Each holder of stock in a refinery company shall be entitled to so many of the shares allotted to such refinery as shall be in proportion of his stock to the capital of his company.

"Shares for stockholders of any refining company who shall not surrender their stock, may, under the direction of the board, be deposited for their account, with the right to receive the same upon the surrender of their stock.

"Of the shares allotted to the several refineries they shall leave 15 per cent. with the board, and these shares and any shares not allotted of the \$50,000,000, except as herein otherwise provided, shall be subject to be disposed of by the board either for the acquisition of other refineries to become parties to this deed, payment for additional capacity, or by appropriations to the several refineries.

"But in no case shall any appropriation be made to or any action taken by any corporation without the approval of its board of directors, and no action be taken by the board which shall create liability by it or by its members.

" PROFITS.

"The profits arising from the business of each corporation shall be paid over by it to the board hereby created, and the aggregate of said profits, or such amount as may be designated for dividends, shall be proportionately distributed by said board, at such times as it may determine, to the holders of the certificates issued by said board for capital stock, as hereinbefore provided.

" FISCAL ARRANGEMENTS.

"The funds necessary to enable the said board to make the payments herein provided to be made by it may be raised by mortgage to be made by the corporations, or either, any, or all of them, on their property, and by such other means as shall be satisfactory to such board.

"In case any mortgage shall be laid on the property of any corporation by its directors or stockholders, the holders of certificates shall, within a time to be fixed by said board, have the right, at such uniform rates as said board shall arrange, to have the bonds, certificates, or other evidence of debt or interest in proportion to their respective holdings. Any parts which shall not be thus taken may be disposed of by said board.

" CHANGES.

" The number of shares and the total amount thereof issuable by said board may from time to time be increased or diminished by deeds executed by a majority in value of the certificate-holders.

" The provisions of this deed may from time to time be changed by deed executed by not less than a majority in interest of the certificate-holders, provided no change shall be made which shall discriminate to the disadvantage of the certificate-holders as between themselves.

" ACQUISITION OF OTHER REFINERIES.

" The capital stock of other sugar refining companies, and of companies whose business relates directly or indirectly to sugar refining (in every instance to be incorporated), may be transferred to said board with the consent of a majority thereof at valuation and upon terms satisfactory to it, to be held by said board, under and subject to all the terms of this deed, and certificates may be issued therefor by said board, and may be sold by it to provide funds for such purchase or purchases, and any such corporation or corporations shall thereupon become a party to this deed upon causing the same to be duly signed in its behalf.

" CUSTODY OF DEED.

" This deed, when executed by the parties hereto, shall be delivered to the president of the board, who shall have the sole and independent custody and control of the same, and the said deed shall not be shown or delivered to any corporation, firm, person, or persons whatsoever, except by the express direction and order of the board.

" A copy of the said deed shall also be lodged with a member of the board residing in Boston, Massachusetts, which shall be held by him under the same condition and in the same manner as the original deed.

" In witness whereof, the parties have hereto set their seals and affixed their names, these presents to become binding when completely executed by all the parties and to take effect from October 1, 1887.

" Dated August 16, 1887.

" HAVEMEYERS & ELDER.

" DONNER & DeCASTRO SUGAR REFINING CO.,

Per H. O. HAVEMEYER, *Manager*. (Subject
to confirmation stock and scripholders.)

" F. O. MATTHIESSEN & WEICHERS SUGAR REF. CO.,
F. O. MATTHIESSEN, *Pres*.

- " HAVEMEYER SUGAR REFINING CO.,
JOHN E. SEARLES, JR., *Treas.*
- " DICK & MEYER.
- " NORTH RIVER SUGAR REFINING CO.,
GEO. H. MOLLER, *Sec.*
- " OXNARD BROTHERS.
- " MOLLER, SIERCK & CO.
- " BROOKLYN SUGAR REFINING CO.,
HENRY OFFERMAN, *Treas.*
- " STANDARD SUGAR REFINING CO.,
By CHARLES O. FOSTER, *Pres.*
- " BAY STATE SUGAR REFINING CO.,
Per EDWIN F. ATKINS, *Pres.*
- " CONTINENTAL SUGAR REFINERY,
By SILAS PIREE, *Pres.*

" The undersigned hereby agree to become parties to the foregoing deed in accordance with the terms and condition therein stated, they to receive without discount the amounts in certificates set opposite their respective signatures.

- " FOREST CITY SUGAR REFINING CO.,
By H. J. LIBBY, *Pres.*
GEO. S. HUNT, *Treas.*
- " ST. LOUIS SUGAR REFINING CO.,
By W. L. NOOTT, *Pres.*
A. D. CUNNINGHAM, *Sec. and Treas.*
- " PLANTERS' SUGAR REFINING CO., New Orleans,
JOHN BARKLEY, *Pres.*
- " LOUISIANA SUGAR REFINING CO.,
JOHN S. WALLIS, *Pres.*"

The execution of the instrument was proved. The name of the defendant was signed thereto by George H. Moller, its secretary, who testified he made the signature in September, 1887, "by virtue of authority from the stockholders of the board of officers of the North River Sugar Refining Co., the stockholders and trustees."

The following records from the minute book of proceedings of the defendant's board of trustees were given in evidence.

" A meeting of the stockholders of the North River Sugar Refining Co., held at the office of the refiners, corner of Water and Corlears Streets, April 22, 1887.

" Present—Peter Moller, Jr., Cord Moller, George H. Moller, Jr., John Moller, Gerd. Martens, Marx Wintjen, Charles Sher-

man, executor for B. B. Sherman's estate; George H. Moller, Gerh'd G. Moller.

"Peter Moller, Jr., in the chair.

"The reading of the minutes in January were dispensed with.

"Mr. George H. Moller offered the following preamble and resolution:

"WHEREAS, It is contemplated that the several sugar refineries in New York and other cities shall consolidate their several refineries in one large concern or company; and

"WHEREAS, We deem it for the interest of the North River Sugar Refining Co. to participate in the above said consolidation; therefore be it

"Resolved, Peter Moller, Jr., George H. Moller, and Gerd. Martens be, and they are hereby appointed a committee to make arrangements to perfect the said consolidation in behalf of the North River Sugar Refining Co. with full power to act and to sign all contracts and agreements in the name of the said North River Sugar Refining Co., of whatever name or nature, concerning the said consolidation.

"Carried by a unanimous vote.

"On motion of George H. Moller it was further

"Resolved, That we authorize the president and secretary of the North River Sugar Refining Co. to sign all contracts, agreements and papers which the above-named committee may make in relation to the said consolidation.

"All present voting in the affirmative.

"GEORGE H. MOLLER, *Secretary.*"

It was proved that at said meeting all of defendant's trustees were present.

"A meeting of the stockholders of the North River Sugar Refining Co. held November 4, 1887.

"Present—Peter Moller, Jr., Charles Sherman, executor of B. B. Sherman's estate, Marx Wintjen, Gerd. Martens, Cord Moller, George H. Moller, Jr., Charles G. Moller, and George H. Moller.

"Peter Moller, Jr., in the chair.

"The minutes of the meeting held on April 22, 1887, were read and approved.

"The following preamble and resolution were offered by Charles G. Moller:

"WHEREAS, At a meeting of the stockholders of the North River Sugar Refining Co., held on the 22d day of April, 1887, Peter Moller, Jr., George H. Moller, and Gerd. Martens were appointed a committee to make arrangements to perfect a consolida-

tion with the several sugar refiners of New York and other cities, with power to sign contracts in the name of the said company looking to this end; and

"WHEREAS, The president and secretary of said company were authorized to sign all contracts and agreements which the said committee might make in relation to said consolidation; and

"WHEREAS, The said committee has failed to make or sign such contracts, and the powers conferred upon it and upon the president and secretary have not been exercised, and it is deemed inexpedient at the present time to enter into any such consolidation as proposed;

"*Resolved*, That the powers conferred upon the said committee and upon the president and secretary as above stated be and the same hereby are revoked, and said committee is discharged from further consideration on the subject, and the resolutions of the date above referred to, conferring such powers, hereby cancelled and annulled.

"The above resolution was carried unanimously.

"GEORGE H. MOLLER, *Secretary*."

"A meeting of the stockholders of the North River Sugar Refining Co. was held at the office of the company, 92 Wall Street, on the 25th day of November, 1887. . . .

"The matter in relation to the North River Sugar Refining Co. with the Sugar Refiners' Union was considered.

"WHEREAS, On or about the 5th day of December, 1887, George H. Moller, secretary of the North River Sugar Refining Co., signed a deed of consolidation of the various sugar refining companies in the United States under the belief that he was authorized so to do, providing for the delivery of the stock of the company to trustees therein named, and for receiving stock of the consolidated company in return as provided in said instrument; and

"WHEREAS, John E. Searles, Jr., has offered to purchase the capital stock of said North River Sugar Refining Co. for the sum of \$325,000, this consideration not to include the six lots of land on the southwest corner of Corlears and Water Streets, for which \$25,000 has been allowed out of the consideration of \$350,000, originally mentioned, the property known as No. 11 and 13 Hubert Street, of books and accounts, bills receivable and all other personal property (not belonging to the refinery) of the North River Sugar Refining Co., and the lease of the stables, and the lease of the office No. 92 Wall Street, except office furniture and safes at the refinery,

"*Resolved*, That Peter Moller, Jr., George H. Moller, and Gerd. Martens be, and they are, appointed a committee to deliver

the said stock to John E. Searles, Jr., or, at his request, to John E. Parsons, John R. Dos Passos, and Franklin Bartlett, trustees, on receipt of the sum of \$325,000, the proceeds to be divided among the stockholders of this date according to their respective shares.

"Carried unanimously."

All of the defendant's capital stock was transferred to Mr. Searles, each stockholder endorsing his certificate in blank. The sum specified, \$325,000, was paid and the proceeds divided among the stockholders. At the time of the transfer, the works of the company were running and continued to do so until January, 1888, up to which time it was agreed they should be run to work up stock on hand. They were then turned over to Mr. Searles and were never run thereafter.

Mr. Searles testified that he was a member of the board created by the deed, and was secretary and treasurer; that, with the exception of stock held by the new board of directors, all of the stock was transferred to that board, which issued certificates to the amount of \$595,000, that is, \$700,000 less 15 per cent. reserved under the provisions of the deed. A dividend of two and a half per cent. was declared by the board in April, 1888, the holders of the certificates issued in exchange for defendant's stock receiving their proportion.

Further facts are stated in the opinion.

James C. Carter and John E. Parsons for appellant.

Charles F. Tabor, Attorney-General, and *Roger A. Pryor* for respondent.

FINCH, J. The judgment sought against the defendant is one of corporate death. The State, which created, asks us to destroy; and the penalty invoked represents the extreme rigor of the law. Its infliction must rest upon grave cause, and be warranted by material misconduct. The life of a corporation is indeed less than that of the humblest citizen, and yet it envelops great accumulations of property, moves and carries in large volume the business and enterprise of the people, and may not be destroyed without clear and abundant reason. That would be true even if the legislature should debate the destruction of the corporate life by a repeal of the corporate charter; but is beyond dispute where the State summons the offender before its judicial tribunals, and submits its complaint to their judgment and review. By that process it assumes the burden of establishing the charges which it has made, and must show us warrant in the facts for the relief which it seeks.

Two of the charges preferred in the complaint have dropped

out of sight. They were of little importance, and have been prudently dismissed from the inquiry for that reason; and we are left to consider the one grave and serious accusation to which alone the proofs and argument have been directed. That accusation is adequate to the purpose for which it was framed, but upon two conditions, which dictate the line of inquiry and limit the area of discussion. It appears to be settled that the State as prosecutor must show on the part of the corporation accused some sin against the law of its being which has produced, or tends to produce, injury to the public. The transgression must not be merely formal or incidental, but material and serious; and such as to harm or menace the public welfare. For the State does not concern itself with the quarrels of private litigants. It furnishes for them sufficient courts and remedies, but intervenes as a party only where some public interest requires its action. Corporations may, and often do, exceed their authority where only private rights are affected. When these are adjusted, all mischief ends and all harm is averted. But where the transgression has a wider scope and threatens the welfare of the people, they may summon the offender to answer for the abuse of its franchise or the violation of its corporate duty. The Code of Civil Procedure authorizes an action for that purpose when the corporation has "violated any provision of law whereby it has forfeited its charter or become liable to be dissolved by the abuse of its powers." In *Thompson v. People*, 23 Wend. 583, the ground of forfeiture was tersely described as "some misdemeanor in the trust injurious to the public;" and as recently as the case of *Leslie v. Lorillard*, 110 N. Y. 531, we said: "In the granting of charters the legislature is presumed to have had in view the public interest; and public policy is concerned in the restriction of corporations within chartered limits; and a departure therefrom is only deemed excusable when it cannot result in prejudice to the public."

Two questions, therefore, open before us: First, has the defendant corporation exceeded or abused its powers? and second, does that excess or abuse threaten or harm the public welfare?

The first question requires us to ascertain what the defendant corporation has done in violation of its duty, or omitted to do in performance of its duty. We find disclosed by the proof that it has become an integral part and constituent element of a combination which possesses over it an absolute control, which has absorbed most of its corporate functions, and dictates the extent and manner and terms of its entire business activity. Into that combination, which drew into its control sixteen other corporations engaged in the refining of sugar, the defendant has gone, in some manner and by some process, for as an unquestionable truth we

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find it there. All its stock has been transferred to the central association of eleven individuals denominated a "Board;" in exchange it has taken and distributed to its own stockholders certificates of the board carrying a proportionate interest in what it describes as its capital stock; the new directors of the defendant corporation have been chosen by the board, made eligible by its gift of single shares, and liable to removal under the terms of their appointment at any moment of independent action. It has lost the power to make a dividend, and is compelled to pay over its net earnings to the master whose servant it has become. Under the orders of that master it has ceased to refine sugar, and by so much has lessened the supply upon the market. It cannot stir unless the master approves, and yet is entitled to receive from the earnings of the other refineries, massed as profits in the treasury of the board, its proportionate share for division among its own stockholders holding the substituted certificates. In return for this advantage it has become liable to be mortgaged, not for its own corporate benefit alone, but to supply with funds the controlling board when reaching out for other and coveted refineries. No one can look these facts fairly in the face without being compelled to say that the defendant is in the combination and in to stay. Indeed, so much is with great frankness admitted on the part of the appellant. Its counsel concedes that the stock was transferred "to the board mentioned in the agreement and on the terms and for the purposes mentioned in the agreement; and that this action effectually lodged the control of the defendant company, so far as such control can be secured by the voting power, in that board."

But that truth does not alone solve the problem presented. We are yet to ascertain whether the corporation became the subordinate and servant of the board by its own voluntary action, or the will and power of others than itself; by force of a contract to which it was in reality a party, or as the simple consequence of a change of owners; by its fault or its misfortune; by a sale or by a trust. For, if it has done nothing, if what has happened, and all that has happened, is ascertained to be that the stockholders of the defendant, one or many, sold absolutely to the eleven men who constituted the board their entire stock, and the latter, by force of their proprietorship and as owners, have merely chosen directors in their own interest, and are only managing their property in their own way as any absolute owners may; if that is the truth, and the entire and exact truth, it is difficult to see wherein the corporation has sinned, or what it has done beyond merely omitting for a time to carry on its business. That is the theory upon which the appellant stands, and which it submits to our examination.

In issue

Def's position

On the other hand it is contended that there never was a sale, but a trust constituted by mutual agreement; that they who agreed were the whole body of stockholders in each corporation necessarily representing and binding the corporation itself; that they transferred their shares to the board upon the trusts declared in the deed; that the certificates issued by the board were the formal declaration of the trust; that the corporate stockholders parted with the legal title of their stock to the chosen trustees with the power to vote upon it, but retained, nevertheless, its beneficial ownership through the operation of the certificates; and so the corporations entered into a partnership with each other, vesting the partnership power in a board of control.

I have brought these two theories face to face where they may confront each other, because, when a choice is made between them, we have gone a long distance toward the end of the controversy.

In making that choice we must necessarily analyze and construe the deed or contract which formed the terms of the combination, and which not only dictated its character, but brought it into existence. That contract, on the theory of a sale, is an unexpected and unaccountable document. A sale presumes vendors on the one side and vendees on the other, each having life and existence and the power and ability to contract. Here there was no joint-stock association existing or organized until the vendors themselves created it, and they were obliged to construct their vendee in the very act of transfer. A contract of sale implies some negotiation between buyer and seller, each consulting his own interest and acting independently and of his free choice. Here there was no negotiation with the board, but the vendors having created their vendee, themselves alone dictated the terms on which they should sell and it should buy. The selling stockholder explicitly swears that the board had nothing whatever to do with fixing the price. In a contract of sale covering property valued at some fifty millions of dollars and containing a patient statement of the terms of the trade, we should naturally expect that at least the buyer would give it his signature and bind himself to the purchase. This contract of sale is not signed by the vendees at all, and their assent is left to be supplied by inference from their action. In an ordinary sale the vendee becomes owner, and has the rights of an owner and may do what he pleases with his own; but this contract tells the owners what they shall do with the property bought, and how they shall hold it, and inferentially at least forbids its further sale or transfer. As a general rule the vendor fixes the value or price of the property which he sells, or sometimes submits the question to disinterested appraisers, but this contract of sale generously allows the value of the personal property, separate

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from the plant, to be appraised and fixed by five persons, all of whom are themselves among the purchasers.

These are general considerations which make one hesitate over the theory of a sale as distinguished from a trust, but the doubt increases as we come closer to the details of the agreement and scrutinize its exact terms.

It is observable that the selected transferee of the stock of the corporations was denominated simply a "board." That implied agency, a committee of managers, official servants charged with executive duties and acting for and in the interest of others. The idea of a joint-stock association, capable of buying and acting as purchaser, had not yet dawned. Explicitly the deed declares "the shares of the capital stock of the several corporations to be transferred to the board as herein provided shall be transferred to the names of the board as trustees, to be held by them and by their successors as members of the board strictly as joint tenants." If beyond the inference of agency, suggested by the name and description of the board, more was needed to indicate the real aim and intention, it is supplied by the frank declaration that the transferees shall take as trustees, and hold in joint tenancy, which is the characteristic manner of a trust.

Other clauses in the instrument point significantly to the same construction. The purchase of stock in a corporation makes the buyer a stockholder. No such purchaser would think for a moment of requiring from the corporation a stipulation that he should have the rights of a stockholder, for those rights attach at once by force of his ownership. Yet we find in the document under examination, following the provision which requires the board to take as trustees, a clause entirely superfluous if a sale was meant, but a reasonable stipulation if a trust was intended, that "the board shall hold the stock transferred to it with all the rights and powers incident to stockholders in the several corporations." The clause carries with it a distinct suggestion that no absolute sale was intended, but a transfer in trust which might leave the assignors who became the beneficiaries some equitable right over the voting power, and to make sure of the vesting of that right in the trustees a specific and broad covenant was adopted adequate for all emergencies.

The owners of corporate stock, by force of their ownership, may put a mortgage upon the corporate property when the statute permits. Nobody doubts that, and no buyer would demand that permission of the seller. But the contract in question explicitly authorizes the board to raise money by mortgages upon the property of the corporations. It strikes one as odd to see an absolute purchaser requiring his vendor in the deed of conveyance to

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covenant that the grantee may be at liberty to encumber by mortgage his own property. The astute pen which framed the deed of association had a very different aim, and realized that trustees, holding for trust purposes, should have power to mortgage given them if that necessity was contemplated.

A vendor about to sell his property, and to a very large amount, naturally looks carefully to his pay. A merchant or manufacturer who should sell his wares to a corporation having no other capital than the exact property bought, and take his pay in the stock of such corporation, would scarcely be deemed sane in business circles. The board organized by the refineries had a nominal capital of fifty millions, but not a single dollar of actual capital beyond the corporate shares transferred; and so the sellers, if, indeed, they were such, got aliquot parts of their own property in payment for the transfer. If they sold it, they simply got it back under a new name and, as we shall see, heavily watered, and with its care and management entrusted to others, under an arrangement which might or might not add to its earning power.

If in truth the board was meant to be anything more than a trustee or manager of the combined corporations, if it was contemplated that it should become and be a joint-stock association at all, it was put by the very articles of its creation under the most singular and oppressive restrictions. What shall we say of a joint-stock association without a dollar of actual capital, and yet forbidden to incur the least debt or obligation? It was commanded that "no action be taken by the board which shall create liability by it or by its members." Without a dollar it could not borrow a dollar; without money it could incur no debt; its cash resources were to come from a sale of its own certificates reserved over and above those allotted, or from mortgages made by the separate corporations, and yet this curious creation, viewed as a joint-stock association, was able to induce the sale to it of twenty corporations. The stockholders with astonishing generosity sold and transferred to it all their stock, allowed it to pocket 15 per cent. of its agreed value, and took aliquot parts of the remainder of their own property for their pay. It seems to me that the theory of an absolute sale involves us in difficulties and complications on almost every page of the deed or combination agreement, and that it is an afterthought framed under pressure and mismatching the entire tenor and terms of the instrument which it was invented to sustain. Indeed, I notice, among the briefs submitted to our study, a reprint of an article from a distinguished pen which traces the origin and history of economic combinations and monopolies, and ends with a determined defense of the one

under review, but concedes it to be a trust, created by contract, and organized and existing as such.

The combination, therefore, framed by the deed was a trust; and, if created by the corporations, or in any respect the consequence or product of their action, some inevitable results would be certain to follow. But here we encounter the stronghold of the appellant's argument, which is, that if the corporations are in some manner in the combination, they are there solely as the result of a contract other than their own; are there without corporate action on their part; and so are sufferers and not sinners. The reasoning leading to that result is so severely technical as to have suggested a justification almost reminding one of an apology. We are called upon to sever the corporation, the abstract legal entity, from the living and acting corporators; as it were, to separate in our thought the soul from the body, and admitting the sins of the latter to adjudge that the former remains pure. Let us first recall the facts in the order of their occurrence.

On the 22d day of April, 1887, there was a meeting of defendant's stockholders at which all the trustees were present. At that meeting the following preamble and resolutions were adopted by a unanimous vote:

"WHEREAS, It is contemplated that the several sugar refineries in New York and other cities shall consolidate their several refineries in one large concern or company; and

"WHEREAS, We deem it for the interest of the North River Sugar Refining Co. to participate in the above said consolidation; therefore be it

"*Resolved*, That Peter Moller, Jr., George H. Moller and Gerd. Martens be, and they are hereby, appointed a committee to make arrangements to perfect the said consolidation in behalf of the North River Sugar Refining Co. with full power to act and to sign all contracts and agreements in the name of the said North River Sugar Refining Co., of whatever name or nature, concerning the said consolidation.

"*Resolved*, That we authorize the president and secretary of the North River Sugar Refining Co. to sign all contracts, agreements, and papers which the above-named committee may make in relation to the said consolidation."

In September following the secretary of the corporation added its signature to the deed. He tells us under oath, "I made that signature by virtue of authority from the stockholders and the board of officers of the North River Sugar Refining Co., the stockholders and trustees." It follows that the committee to whom authority was given to make the agreement had made it. The stockholders by a unanimous vote decided to go into the proposed

combination, and authorized their committee to agree on the terms. A trust of personal property may be created by parol. That the committee acted, that they contracted for their company upon the terms of the deed, is an inevitable inference from the action of the secretary, who swears that he signed by authority, and could have had none except upon the agreement of the committee. It was, therefore, actually made, and the official signature was but the evidence of the agreement entered into by them. Here was a deliberate corporate act, if stockholders and trustees united can ever perform one, attested by one of the two officers who were authorized to sign. At that moment the defendant company had become a party to the contract by the consent of everybody connected with the corporation, and by force of the agreement to that effect which the signature of the secretary shows had been made by the authorized agency.

Sec.
signed

But it is said the corporation repented and withdrew from the agreement. I do not stop to discuss the question whether they could revoke without the consent of the board and their associates in the trust deed, for assuming that they could, I prefer to analyze their revocation and see the scope and range of their repentance. The corporation remained a contracting creator of the trust until November 4, 1887. By the deed, the trust took effect on October 1 of that year, so that the defendant in its full corporate character became a party to it according to the terms of the deed, and remained bound by it for at least one month. But then there *did* come either repentance or fear. In November the stockholders again assembled and passed the resolution which is relied upon as a revocation. Its preamble recites a series of denials that the committee had made any agreement or that the president and secretary had signed any, and then, after declaring "it is deemed inexpedient at the present time to enter into any such consolidation," they revoked the powers conferred and the resolutions conferring them. That is to say, after the powers had been executed and had put the corporation into the combination, and it had become a constituent element of the trust, those powers were revoked upon a false assertion that they remained executory, and so their revocation could be effective. I say a false assertion, for we are not at liberty to believe that George H. Moller, who was secretary of the corporation and one of the very committee authorized to make the agreement of consolidation, signed the deed when he knew that the committee had not agreed, and so in violation of his duty and without authority, and then positively swore that he signed by authority of the stockholders and trustees. His act and his oath heavily outweigh the resolutions of repentance. Let us not fail to observe that no signature is withdrawn, no notice is served

upon the board or the associates, no consent of theirs asked or demanded, but the parties of one part to a contract come together and pass a resolution that they have not contracted and do not mean to, and rely upon that as releasing them from their obligation. All that they effectively did was to raise a question of veracity which must be decided against them upon the act and the oath of their own officer.

That repentance proved to be only a prelude to the exact sin claimed to have been avoided. On the 25th of November, 1887, which was just three weeks after the resolutions of revocation, the stockholders of the defendant company formally resolved to sell their capital stock for \$325,000 to John E. Searles, Jr. It is not unworthy of notice that the resolution to sell is prefaced by a recital that their secretary had signed a deed of consolidation "under the belief that he was authorized so to do," a matter which had nothing to do with the new agreement to sell unless the purpose of that agreement lay beneath the surface. The committee to deliver the stocks consisted of the same three persons who had originally been authorized to make the agreement of consolidation which had already been signed by Searles as treasurer of the Havemeyer Sugar Refining Co. The stock was delivered to him, the price paid to the stockholders, and so Searles became the one sole and only stockholder of the defendant company. He and the "legal entity" alone survived, and the latter apparently in a state of suspended animation. An effort was made to ascertain from what source the purchase-money came, but was not altogether successful. Searles did not furnish it. A certain committee of three did, who were to transfer the stock to the board. Searles adds: "Those three gentlemen whom I have named as trustees of certain funds paid for the stock: fund received by them for mortgages and other matters connected with the organization. Q. What organization? A. The Sugar Refineries Co., the board." Well, the board got the stock from Searles, sole owner and sole stockholder, and gave in exchange certificates for \$700,000, or a little more than double the purchase-price, and which indicates the amount of water in the board's capital stock. From that, however, was deducted the 15 per cent. retained by the combination. What Searles did with the certificates we do not know, nor is it important to ascertain. We do know that new directors were chosen by the vote of the board; that Searles became president of the corporation; that its share of the regular dividend has been allotted to it for its certificate-holders, and that it has wholly ceased to refine sugar. And thus its baptism in the pool of the board became complete and final.

And yet it is argued that the corporation, the legal entity, has

done nothing ; that Searles was guilty, but the corporate robe that enveloped him was innocent, and so he must be left to wear it undisturbed ; that while all that was human and could act had sinned, yet the impalpable entity had not acted at all and must go free. I believe that the history of what occurred, as I have already described it, furnishes a sufficient answer, assuming that stockholders and trustees acting together can do a corporate act at all. There was corporate action in making the combination agreement which bound the defendant. The revocation of an executed authority left the contract standing. The corporation thus helped to make the trust and became an element of it. If there was anything imperfect in its action, the new stockholder and his associates waived the imperfection by acting upon the agreement of the corporation, and so confirming it in all particulars.

But the assumption underlying the view I have expressed is itself contested, and a proposition asserted which denies the possibility of any corporate action, except by the trustees or directors acting formally as such ; a proposition which, if sound, dominates the whole field of controversy, and, establishing that there has been no corporate action at all, effectually shuts out every question of illegality or public injury. I cannot admit that proposition. I think there may be actual corporate conduct which is not formal corporate action ; and where that conduct is directed or produced by the whole body, both of officers and stockholders, by every living instrumentality which can possess and wield the corporate franchise, that conduct is of a corporate character, and if illegal and injurious may deserve and receive the penalty of dissolution. There always is, and there always must be, corporate conduct without formal corporate action where the thing challenged is an omission to act at all. A corporation organized in the public interest, with a view to the public welfare, and in the expectation of benefit to the community, which is the motive of the State's grant, may accept the franchise and hold it in sullen silence, doing nothing, resolving nothing, furnishing no formal corporate action upon which the State can put its finger and say, this the corporation has done by the agency through which it is authorized to act. That is corporate conduct which the State may question and punish without searching for a formal corporate act. The directors of a corporation, its authorized and active agency, may see the stockholders perverting its normal purposes by handing it over, bound and helpless, to an irresponsible and foreign authority, and omit all action which they ought to take, offer no resistance, make no protest, but silently acquiesce as directors in the wrong which as stockholders they have themselves helped to commit. That again is corporate conduct, though there be an utter

absence of directors' resolutions. Is it asked what they could have done to prevent the organization of the trust; how they were negligent and unfaithful as corporate officers by their omission to act; what good a mere protest or objection would have accomplished; what effective form their resistance could have assumed? The answer is that they could have refused to recognize the illegal trust transfer of the stock; they could have declined to register the new ownership upon their stock-books; they could have said, and acted upon their words, that the original stockholders remained not only the beneficial, but the legal owners of the stock; and, if the board trustees appealed to the law, the resisting directors could challenge the legality of the transfer as moulded by the combination agreement, and might have defeated the trust and shattered it at the outset of its career. So much they could have done as corporate officers; so much it was their duty to have done as representatives of the corporation; and when, beyond that corporate neglect, they recognized the validity of the stock transfers in trust, put the new and unlawful ownership upon their books, and accepted its votes in the choice of new directors who were to throttle the independence of the corporation and chain it to the will of the trust, I think we must shut our eyes in wilful blindness if we fail to see both corporate neglect and corporate action.

It is true, as we are reminded, that the statute confers upon trustees and directors general authority to manage the stock, property, and concerns of manufacturing corporations; and equally true that, as a general rule and as between the companies and those with whom they deal, the corporate action must be manifested through and by the directors; but other statutes indicate with equal plainness that there are corporate acts which the trustees cannot perform, and which affect and bind the corporation only upon the condition that they proceed from the stockholders, or from them and the trustees acting together. In increasing or diminishing the capital stock, the corporate act is wholly that of the corporators, and in consolidating two or more companies into one there must be the joint action of both trustees and stockholders. The trust of the refineries, in substance and effect, approached very near to these two corporate acts, so far as the resultant consequences affected the corporators acting. The trust stipulations practically doubled their corporate stock through the agency of the certificates issued, and the combination in its result is largely the equivalent of a substantial consolidation. If these things had been done lawfully, they would have been accomplished by the united action of trustees and corporators, and beyond any question would have been corporate acts. Having been done unlawfully, but by the same united agency

aiming at similar results, they must still constitute corporate conduct, unless the bare fact of their illegality takes away their corporate character. To say that would disarm the State in every case of misuse or abuse of chartered powers.

The abstract idea of a corporation, the legal entity, the impalpable and intangible creation of human thought is itself a fiction, and has been appropriately described as a figure of speech. It serves very well to designate in our minds the collective action and agency of many individuals as permitted by the law; and the substantial inquiry always is what in a given case has been that collective action and agency. As between the corporation and those with whom it deals, the manner of its exercise usually is material, but as between it and the State, the substantial inquiry is only what that collective action and agency has done, what it has, in fact, accomplished, what is seen to be its effective work, what has been its conduct. It ought not to be otherwise. The State gave the franchise, the charter, not to the impalpable, intangible, and almost nebulous fiction of our thought, but to the corporators, the individuals, the acting and living men, to be used by them, to redound to their benefit, to strengthen their hands and add energy to their capital. If it is taken away, it is taken from them as individuals and corporators, and the legal fiction disappears. The benefit is theirs, the punishment is theirs, and both must attend and depend upon their conduct; and when they all act, collectively, as an aggregate body, without the least exception, and so acting reach results and accomplish purposes clearly corporate in their character, and affecting the vitality, the independence, the utility, of the corporation itself, we cannot hesitate to conclude that there has been corporate conduct which the State may review, and not be defeated by the assumed innocence of a convenient fiction. As was said in *People ex rel. v. K. & M. T. R. Co.*, 23 Wend. 193, "though the proceeding by information be against the corporate body, it is the acts or omissions of the individual corporators that are the subject of the judgment of the court."

It remains to determine whether the conduct of the defendant in participating in the creation of the trust and becoming an element of it was illegal and tended to the public injury, and we may consider the two questions together and without formal separation.

It is quite clear that the effect of the defendant's action was to divest itself of the essential and vital elements of its franchise by placing them in trust; to accept from the State the gift of corporate life only to disregard the conditions upon which it was given; to receive its powers and privileges merely to put them in pawn; and to give away to an irresponsible board its entire independence and self-control. When it had passed into the hands of the trust,

only a shell of a corporation was left standing, as a seeming obedience to the law, but with its internal structure destroyed or removed. Its stockholders, retaining their beneficial interest, have separated from it their voting power, and so parted with the control which the charter gave them and the State required them to exercise. It has a board of directors nominally and formally in office, but qualified by shares which they do not own, and owing their official life to the board which can end their power at any moment of disobedience. It can make no dividends whatever may be its net earnings, and must encumber its property at the command of its master, and for purposes wholly foreign to its own corporate interests and duties. At the command of that master it has ceased to refine sugar, and without any doubt for the purpose of so far lessening the market supply as to prevent what is termed "over-production." In all these respects it has wasted and perverted the privileges conferred by the charter, abused its powers, and proved unfaithful to its duties. But graver still is the illegal action substituted for the conduct which the State had a right to expect and require. It has helped to create an anomalous trust which is, in substance and effect, a partnership of twenty separate corporations.//The State permits in many ways an aggregation of capital, but mindful of the possible dangers to the people over-balancing the benefits, keeps upon it a restraining hand, and maintains over it a prudent supervision, where such aggregation depends upon its permission and grows out of its corporate grants. It is a violation of law for corporations to enter into a partnership. *N. Y. & S. C. Co. v. F. Bank*, 7 Wend. 412; *Clearwater v. Meredith*, 1 Wall. 29; *Whittenton Mills v. Upton*, 10 Gray, 596. The case last cited furnishes the reasons with precision and at length. It shows the utter inconsistency of a double allegiance by those who act for the corporation to two different principals, and demonstrates that the vital characteristics of the corporation are of necessity drowned in the paramount authority of the partnership. That the combination of the refineries partakes of the nature of a partnership is not denied. Indeed, in one of the papers added to the appellant's brief, it is not only admitted, but asserted and defended. That paper shows quite clearly that by force of the arrangement there was a community of interest in the fund created by the corporate earnings before division, and that each member of the trust shared in the profit and loss of all. It is said, however, that a consolidation of manufacturing corporations is permitted by the law, and that the trust or combination or partnership, however it may be described, amounts only to a practical consolidation which public policy does not forbid because the statute permits it. Laws of 1867, c. 960;

Laws of 1884, c. 367. The refineries did not avail themselves of that statute. They chose to disregard it, and to reach its practical results without subjection to the prudential restraints with which the State accompanied its permission. If there had been a consolidation under the statute, one single corporation would have taken the place of the others dissolved. They would have disappeared utterly, and not, as under the trust, remained in apparent existence to threaten and menace other organizations and occupy the ground which otherwise would be left free. Under the statute the resultant combination would itself be a corporation deriving its existence from the State, owing duties and obligations to the State, and subject to the control and supervision of the State, and not, as here, an unincorporated board, a colossal and gigantic partnership, having no corporate functions and owing no corporate allegiance. Under the statute the consolidated company taking the place of the separate corporations could have as capital stock only an amount equal to the fair aggregate value of the rights and franchises of the companies absorbed, and not as here, a capital stock double that value at the outset and capable of an elastic and irresponsible increase. The difference is very great and serves further to indicate the inherent illegality of the trust combination.

And here I think we gain a definite view of the injurious tendencies developed by its organization and operation, and of the public interests which are menaced by its action. As corporate grants are always assumed to have been made for the public benefit, any conduct which destroys their normal functions, and maims and cripples their separate activity, and takes away their free and independent action, must so far disappoint the purpose of their creation as to affect unfavorably the public interest; and that to a much greater extent when beyond their own several aggregations of capital they compact them all into one combination which stands outside of the ward of the State, which dominates the range of an entire industry, and puts upon the market a capital stock proudly defiant of actual values, and capable of an unlimited expansion. It is not a sufficient answer to say that similar results may be lawfully accomplished; that an individual having the necessary wealth might have bought all these refineries, manned them with his own chosen agents, and managed them as a group at his sovereign will; for it is one thing for the State to respect the rights of ownership and protect them out of regard to the business freedom of the citizen, and quite another thing to add to that possibility a further extension of those consequences by creating artificial persons to aid in producing such aggregations. The individuals are few who hold in possession such enormous wealth,

and fewer still who peril it all in a manufacturing enterprise; but if corporations can combine, and mass their forces in a solid trust or partnership, with little added risk to the capital already embarked, without limit to the magnitude of the aggregation, a tempting and easy road is open to enormous combinations, vastly exceeding in number and in strength and in their power over industry any possibilities of individual ownership; and the State, by the creation of the artificial persons constituting the elements of the combination, and failing to limit and restrain their powers, becomes itself the responsible creator, the voluntary cause of an aggregation of capital which it simply endures in the individual as the product of his free agency. What it may bear is one thing, what it should cause and create is quite another.

And so we have reached our conclusion, and it appears to us to have been established, that the defendant corporation has violated its charter and failed in the performance of its corporate duties, and that in respects so material and important as to justify a judgment of dissolution. Having reached that result, it becomes needless to advance into the wider discussion over monopolies and competition and restraint of trade and the problems of political economy. Our duty is to leave them until some proper emergency compels their consideration. Without either approval or disapproval of the views expressed upon that branch of the case by the courts below, we are enabled to decide that in this State there can be no partnerships of separate and independent corporations, whether directly or indirectly through the medium of a trust; no substantial consolidations which avoid and disregard the statutory permissions and restraints, but that manufacturing corporations must be and remain several as they were created, or one under the statute.

The judgment appealed from should be affirmed with costs.

All concur.

Judgment affirmed.

THE PEOPLE OF THE STATE OF NEW YORK, RESPOND-
ENT, v. THE BUFFALO STONE AND CEMENT
CO., APPELLANT.

IN THE COURT OF APPEALS OF NEW YORK, FEBRUARY 9, 1892.

[*Reported in 131 New York Reports 140.*]

APPEAL from judgment of the General Term of the Superior Court of the city of Buffalo, entered upon an order made June 16, 1891, which affirmed a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term.

This action was brought by the Attorney-General on behalf of the people to annul the defendant's charter.

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The defendant was organized as a corporation on the 18th day of August, 1885, under the General Manufacturing Act of 1848. Its capital stock was \$90,000, divided into nine hundred shares of one hundred dollars each. Prior to its incorporation, the persons who proposed to take its stock entered into a written agreement that each subscriber for stock should pay fifteen per cent. of the amount of his stock at the time of his subscription, and that the balance should be paid on calls to be made, not exceeding ten per cent. at a time, within ten years. During the first two years of the defendant's corporate existence only seventy-seven and one-half per cent. of the capital stock was paid in, and no more has been paid in since; and the annual report required by section 12 of the act, for January, 1889, was not made. On the 2d of March, 1889, a petition signed by various stockholders of the defendant was presented to the Attorney-General asking him to commence an action against the defendant to have its franchises forfeited and its charter annulled. Thereafter the Attorney-General made an application to a Special Term of the Supreme Court for leave to commence an action to annul the charter, and an order was made by the court on the 23d day of April, 1889, granting such leave, and this action was commenced on the following day. The action was brought to trial and resulted in a judgment in favor of the plaintiff, dissolving the defendant and forfeiting its rights, privileges and franchises and appointing a receiver of its property and effects.

Charles Daniels for appellant.

Henry W. Brendell for respondent.

EARL, Ch. J. Section 1798 of the Code provides that upon leave being granted as prescribed in the preceding section, the Attorney-General may bring an action against a corporation created by or under the laws of the State, to procure a judgment vacating its charter, or annulling its existence, upon the grounds that it has " (1) offended against any provision of an act by or under which it was created, altered or renewed, or an act amending the same and applicable to the corporation; or (2) violated any provision of law whereby it has forfeited its charter or become liable to be dissolved by the abuse of its powers." In such a case the Attorney-General may, upon his own information, or upon an application made to him by any citizen, move the court for leave to bring the action. He must determine in the first instance whether the public interests require that the action should be brought, and thus that it is his duty to bring it, and then he must make application to the court for leave to bring it; and the court may exercise its

discretion whether or not it will grant the leave. We have several times held that its discretion in such a case is not reviewable in this court. Such an action may be brought by the Attorney-General in the name of the people, without a relator, and it is strictly a people's action. It is provided in section 1808 that 'in a case where the action can be brought only by the Attorney-General in behalf of the people, if a creditor, stockholder, director or trustee of the corporation applies to the Attorney-General for that purpose, and furnishes the security required by law, the Attorney-General must bring the action, or apply for leave to bring it, if he has good reason to believe that it can be maintained. Where such an application is made, section 1986 of this act applies thereto.' Section 1986 provides as follows: "Where an action is brought by the Attorney-General, as prescribed in this title, on the relation or information of a person having an interest in the question, the complaint must allege and the title of the action must show that the action is brought upon the relation of that person. In such a case the Attorney-General must, as a condition of bringing the action, require the relator to give satisfactory security to indemnify the people against the costs and expenses thereof. Where security is so given, the Attorney-General is entitled to compensation for his services, to be paid by the relator in like manner as the attorney and counsel for a private person." That provision applies only to cases where the action is instituted in the name of the people to protect or secure the interests of individuals, like the actions specified in section 1781 of article 2, and sections 1784 and 1785 of article 3 of the Code, and in all cases where mere private interests are sought to be promoted by the commencement of the action by the Attorney-General in the name of the people. But an action to annul a corporation under article 4 is purely a public action and proceeds upon public grounds, and it cannot be said, within the meaning of section 1986, that any person who instigates such an action, or applies to the Attorney-General to have it commenced, has any interest in the questions involved in the action. The simple question to be determined in such an action is whether the existence of the corporation shall be permitted to continue, and it in no way concerns the rights and interests of the persons interested in the corporation as between each other. It is simply a question between the corporation and the people, and to determine that question no individual need be present as a party to the action. Therefore, it is of no legal consequence that some of the persons who applied to the Attorney-General to commence this action were the very trustees who omitted to make the annual report as required by section 12 of the Manufacturing Act, or the very stockholders who omitted to pay for their stock. Their acts in no way

prejudice the rights of the people. If a cause of forfeiture against the corporation exists, there is nothing in the conduct of any of the stockholders or officers of the corporation which can defeat the right of the people to enforce the forfeiture.

a *τ* It is provided in section 12 of the Manufacturing Act of 1848 that every company formed under that act shall, within twenty days from the 1st day of January of each year, make the report as required by that section, which shall state the amount of capital, and of the proportion actually paid in, and the amount of its existing debts, which report shall be signed by the president and a majority of the trustees, and shall be verified by the oath of the president or secretary of the company and filed in the office of the clerk of the county where the business of the company shall be carried on.

R. The provision is that "every such company" shall make the report, and the duty to make it is a corporate duty imposed upon the company. *Cornell v. Roach*, 101 N. Y. 373. This duty was not performed, and it is claimed on behalf of the people that for the neglect, omission or refusal to perform it, there was cause for annulling its charter under the provision of the Code above set out. The duty is not simply one in which particular persons are alone interested, but it is a duty which the corporation owes to the public generally for the protection of all persons who may have occasion to deal with it, and to subserve a plainly expressed public policy; and for the omission to perform the duty it incurs the liability of forfeiture of its charter. Corporations are formed for definite objects, and their powers and duties are prescribed by law. The State confers upon them valuable franchises, and to carry out its policy exacts the performance of specified duties. They must exercise their franchises and perform the duties and obey the commands of the law as conditions of their existence. If they fail to travel in the orbits designated by the laws of their existence, the State may take away the corporate life which it has created. // Such was the rule of the common law, and such has for a long time been the statute law of this State. In *People ex rel. v. Kingston and Middletown Turnpike Road Co.*, 23 Wend. 193, it was held that non-compliance with the requirements of an act of incorporation of a turnpike company as to the construction of the road, is *per se* a misuser, forfeiting the privileges and franchises conferred; that the duties enjoined by an act of incorporation are conditions attached to the grant of the franchises conferred, and that it is not necessary to work a forfeiture that the neglect or refusal to perform the duties enjoined should proceed from a bad or corrupt motive; that it is enough that the duties be neglected or designedly omitted. Nelson, Ch. J., writing the opinion of the court

and construing provisions of the Revised Statutes substantially like those of the Code which we are now called upon to construe, said: "The statutes obviously intended that corporations should fulfil the conditions and perform the duties enjoined by the fundamental law of their creation, as the terms upon which to enjoy their privileges. The principle is not new. It has been always so held at common law as fundamental. Lord Holt said in *London City v. Vanacker*, 1 Ld. Raym. 498: 'All franchises which are granted are upon condition that they shall be duly executed, according to the charter that settles their constitution; and that being a condition annexed to the grant, the citizens cannot make an alteration, but if they neglect to perform the terms of the patent, it may be repealed by *scire facias*.' The principle is so thoroughly and firmly fixed in the law of corporate bodies, that I need do no more than refer to some of the authorities. A non-performance, therefore, of the conditions of the act of incorporation is deemed *per se* a misuser, that will forfeit the grant even at common law." In *Attorney-General v. Petersburg, etc., R. R. Co.*, 6 Ired. L. R. 456, it was held by the Supreme Court of North Carolina that the failure of a railroad company to comply with a provision of its charter requiring the president and directors of the company to make an annual statement of its income and return the same to the General Assembly, in order to enable the latter to regulate the tolls charged by the company, was a cause for declaring a charter forfeited. Ruffin, Ch. J., delivering the opinion of the court, said: "We entertain no doubt that the omission of an express duty prescribed by a charter to a corporation is a cause of forfeiture. Its performance is in the nature of a condition, and the sovereign may insist on resuming his grant for the breach of the condition. . . . When the charter expressly imposes a duty which the company is to perform, not merely to the citizen, but toward the sovereign itself, although it may not declare that non-performance shall make a forfeiture, yet by no latitude of equitable interpretation can it be regarded as a hard bargain, and as such relieved against in a court of law; but it must be taken to have been required by the State as a material stipulation, for the non-performance of which by the corporation the State may put an end to the contract."

But it is further provided in section 12 that if the corporation shall fail to make the report "all the trustees of the company shall be jointly and severally liable for all the debts of the company then existing and for all that shall be contracted before such report shall be made," and it is contended by the learned counsel for the appellant that that is the only consequence which is to follow from a failure to make the report; and he invokes the general

rule of law that "when a duty is prescribed, and the consequence of a failure to perform it has been declared, it is in its nature an implied prohibition of all other punishments." Under the rule referred to it must be held that the statute provides the only consequence to the trustees, and the only liability or penalty that can be imposed upon them. But section 12 imposed no liability or penalty upon the corporation for a failure to make the report. Such a failure of duty on the part of a corporation, in the performance of which the public are interested, is left to be dealt with by the general provisions of law applicable to corporations, and its liability to forfeit its charter is the only consequence to it; and thus for the failure to make the report the corporation may suffer for an omission to perform a corporate duty, and the trustees may suffer for an omission to perform an official duty resting upon them.

R ~ But there is still another ground for upholding this judgment which is liable to less criticism. It is provided in section 10 of the General Manufacturing Act, that the capital stock of every corporation formed under the act, as fixed and limited in its articles of incorporation, "shall be paid in, one-half thereof in one year, and the other half thereof in two years from the incorporation of such company, or the corporation shall be dissolved." Here was an express duty imposed upon this corporation to see to it that all its stock was paid in within the time specified, and that was made an imperative duty, as it is provided that it *shall* be paid in, and if that condition is not performed the corporation *shall* be dissolved. We do not see how it is possible to so construe this language as to relieve a corporation from forfeiture of its charter for a non-compliance with the condition. When it is claimed that this provision of the statute has been violated, the Attorney-General may exercise his discretion, based upon all the facts in the case, whether the public interests require that he should commence an action, and when he applies to the court for leave to commence it, it may exercise its discretion in the same way. But if he and it determine that it ought to be commenced, and it has been commenced and it is proved that the stock has not all been paid in within the two years, then the statute is imperative that the corporation shall be dissolved; and no discretion at that stage of the case seems to be left to the court. But here, if the court had any discretion, it has exercised it by giving judgment for dissolution. As we have before stated, that some or all the persons who applied to the Attorney-General to commence the action for a dissolution were among those who omitted to pay for their stock, can have no legal effect whatever upon this action. It is sufficient for its maintenance that the corporation has omitted to

enforce the payment of its stock within the time prescribed by law.

Our conclusion, therefore, is that the judgment should be affirmed with costs.

All concur—ANDREWS, FINCH, GRAY and O'BRIEN, JJ.—on second ground stated in the opinion.

Judgment affirmed.

CHAPTER III.

CORPORATE POWERS.

SECTION I.—POWERS IN GENERAL.

COLEMAN *v.* THE EASTERN COUNTIES RAILWAY CO.

IN CHANCERY, BEFORE LORD LANGDALE, M. R., DECEMBER 17, 23,
1846.

[*Reported in 10 Beavan 1.*]

Kindersley and Grove on behalf of the defendants.

Turner, Roupell, and Twells for the plaintiff.

MASTER OF THE ROLLS. This is a motion to dissolve an *ex parte* injunction, restraining the defendants from entering into a particular agreement with a company called the Harwich Steam Packet Company.¹

Three reasons have been offered for dissolving the injunction. One is personal to the plaintiff; and as to this, I am of opinion, looking at the affidavit of Mr. Roney, that there is not sufficient ground to say that the plaintiff has not a right to sue and ask for an injunction, if the merits of his case entitle him to one.

The next objection is as to the form of the pleadings; and I do not think I should be right in coming to a conclusion upon it, without carefully examining the frame of the record.²

The third ground is upon the merits; and I think, after the full discussion the matter has undergone, and considering the great and extensive importance of the principle involved in it, that I ought not to abstain from at once giving my opinion upon the point.

There are four parties to be considered: the plaintiff, the defendants, the Eastern Counties Railway Company, the Eastern Union Railway Company, and a company, or proposed company, called the Harwich Steam-Packet Company. The plaintiff is a shareholder in the Eastern Counties Railway Company, and has

¹ The statement of facts has been omitted.—Ed.

² On this point *Deeks v. Stanhope*, 14 Sim. 57, was afterward referred to.

no interest whatever except in that company, and he is exposed to no liability except such as may be incurred in properly carrying on the business of that company.

I think it right to observe, that companies of this kind, possessing most extensive powers, have so recently been introduced into this country, that neither the legislature nor courts of justice have been yet able to understand all the different lights in which their transactions ought properly to be avoided. We must, however, adhere to ancient general and settled principles, so far as they can be applied to great combinations and companies of this kind.

Joint-stock companies have funds so extremely large, and exercise powers so extensive and so materially affecting the rights and interests of other persons and the rights which the public or the subjects of her Majesty have been accustomed to enjoy under the protection of the laws established in this kingdom, that to look upon a railway company in the light of a common partnership, and as subject to no greater vigilance than common partnerships are, would, I think, be greatly to mistake the functions which they perform, and the powers which they exercise of interference, not only with the public but with the private rights of all individuals in this realm. We are to look upon those powers as given to them in consideration of a benefit which, notwithstanding all other sacrifices, it is to be presumed and hoped, on the whole, will be obtained by the public. But it being the interest of the public to protect the private rights of all individuals, and to defend them from all liabilities beyond those necessarily occasioned by the powers given by the several acts, those powers must always be carefully looked to, and I am clearly of opinion that the powers which are given by an act of Parliament, like that now in question, extend no farther than is expressly stated in the act, or is necessarily and properly required for carrying into effect the undertaking and works which the act has expressly sanctioned.

How far those powers, which are necessarily or properly to be exercised for the purposes intended by the act, extend may very often be a subject of great difficulty. We cannot always ascertain what they are. Ample powers are given for the purpose of constructing and maintaining the railway, and for doing all those things required for its proper use when made; but I apprehend, that it has nowhere been stated, that a railway company, as such, has power to enter into all sorts of other transactions. Indeed, it has been very properly admitted, that railway companies have no right to enter into new trades or businesses not pointed out by their acts; but it has been contended, that they have a right to pledge, without limit, the funds of the company for the encouragement of other transactions, however various and extensive, pro-

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vided the object of that liability is to increase the traffic upon the railway, and thereby to increase the profit to the shareholders. There is, however, no authority for anything of that kind.

It has been stated that these things, to a small extent, have frequently been done since the establishment of railways; but unless the acts so done can be proved to be in conformity with the powers given by the special acts of Parliament, under which those acts are done, they furnish no authority whatever. To suppose that the acquiescence of railway shareholders, for the last fifteen years, in any transaction conducted by a railway company, is any evidence whatever of their having a lawful right to enter into it, is, I think, wholly to forget the sort of frenzy which, during that period, the country has been in. There has been no project, however wild, which has not been encouraged by some one or more of these companies; there has been no project, however wild, in which the shareholders have not acquiesced, either from cupidity, hoping to gain extraordinary profits, beyond their first anticipations, or from the terror of entering into a contest with a combination of persons so powerful as a railway company. I must, in the absence of any legal decision, say that I consider that the acquiescence of the shareholders in such transactions affords no ground whatever for the presumption of their legality.

I am far from saying, that that which is here proposed to be done might not be profitable to this company, or that it might not be a public advantage. I am far from expressing an opinion, that the establishment of a steam-packet company at Harwich, communicating with this railway, might be not only of public, but of national, importance, or that it might not be proper to give this company authority to do that which they are now attempting to do, as it seems to me, without authority: I mean to express no opinion as to this.

What they are doing is this: under the powers of this act of Parliament enabling them to do what is required, for the construction, maintenance, and proper and convenient use of this railway, they are proposing to pledge the funds of this company, to support the proposed Harwich Steam-Packet Company, to the extent of £150,000, or even £300,000. The agreement is of this nature: a proposition is made to certain individuals to establish a steam-packet company from Harwich to the northern ports, and the directors say, we will do all that we can to encourage the shareholders in the railway company to become shareholders in the steam-packet company. This might be a very legitimate and proper mode of encouragement, because it would be done at the expense and risk of each individual, who makes his own choice, whether he will incur any liability. But besides this, the directors

of the railway company propose, whatever may be the success of the steam-packet company, and even if it should fail, to secure to the subscribers to the steam-packet company interest to the extent of £5 per cent. upon the capital out of the funds of the railway company; and, moreover, if the steam-packet company should fail altogether, so that it would be proper to put an end to it, the directors of the railway company propose—that the funds of the railway company shall be pledged to pay back to every subscriber to the steamboat company the full amount of his subscription.

It is not proposed that the railway company should directly, and by their own directors, engage in the steam-packet company, and carry on that trade; but only that they should impose on the railway company the whole risk and liability not only of paying interest at the rate of £5 per cent., but if the transaction should turn out an unprofitable one, of making good to every shareholder the full amount which he has paid. Is there anything in this act of Parliament sanctioning such a course of proceeding? Do the powers to construct, maintain, regulate the traffic, and to do all that is necessary for the purpose of carrying on and working the railroad, imply that the directors are to be at liberty to pledge the funds of the company for a completely different transaction, in the hope that it may turn out a profitable one, and by being itself profitable, add to the profits of the railway company? Surely there is nothing in the powers given by this act of Parliament which can authorize that.

It has been argued, that I must either allow this to be done, or that I must hold that nothing can be done that is at all out of the express words of the act of Parliament. Now, I shall remain of opinion, until it has been decided otherwise by higher authority, that this is not within the powers given by the act of Parliament; and when another and a different case is brought before the court, it will be judged of by the circumstances which attend it. // But I must say that, in my opinion, to pledge the funds of this company for the purpose of supporting another company engaged in a hazardous speculation, is a thing which, according to the terms of this act of Parliament, they have not a right to do. At the same time, I am far from saying, that there may not be many small things, perhaps small excesses of authority, which are obviously so beneficial, that the shareholders would all acquiesce in them, and never think of complaining of them. It does not, therefore, follow that they cannot do the least thing not expressly mentioned in the act. I believe they have the power to do all such things as are necessary and proper for the purpose of carrying out the intention of the act of Parliament, and they have no power of doing anything beyond it.

R I do not know how to enter into a discussion of how far such a proceeding is affected by the principles of public policy; but this may be observed, that if there is any one thing more desirable than another, after providing for the safety of all persons travelling upon railways, it is this: that the property of railway companies should be itself safe; that a railway investment should not be considered a wild speculation, exposing those engaged in it to all sorts of risks, whether they intended it or not. *¶* Considering the vast property which is now invested in railways, and how easily it is transferable, perhaps one of the best things that could happen to them would be, that the investment should be of such a safe nature, that prudent persons might, without improper hazard, invest their moneys in it. Quite sure am I, that nothing of that kind can be approached if railway companies should be at liberty to pledge their funds in support of any plausible speculations, not authorized by their legal powers, and which might, very possibly, to say the least, lead to extraordinary losses on the part of the railway company.

I repeat, as I said at first, that I consider this to be a question of great importance, not merely to the railway companies who claim these powers, but to the public, in a greater variety of ways than it is necessary for me to point out upon this occasion. I say, therefore, that, subject to the examination which I shall feel it my duty to give to the pleadings, I shall not dissolve this injunction. If I find that the pleadings are improperly framed, then I think the objection ought to be brought forward in another form, namely, by demurrer.

The Master of the Rolls stated that he had examined the bill, and was of opinion that it had been properly framed, and that the injunction must be continued.

THE EAST ANGLIAN RAILWAYS CO. *v.* THE EASTERN COUNTIES RAILWAY CO.

IN THE COMMON PLEAS, DECEMBER 5, 1851.

[Reported in 11 *Common Bench Reports* 775.]

Bramwell, with whom was *T. Wheeler*, in support of the demurrer.

Sir Fitzroy Kelly, with whom were *Crowder* and *Bovill*, *contra*.
JERVIS, Ch. J., now delivered the judgment of the court.¹

¹ The demurrer was argued in the last term before Jervis, Ch. J.; Maule, Williams, and Talfourd, JJ.

This is an action of covenant.¹ The declaration states that, before the contract was made, there were four railway companies, each incorporated by a separate act of Parliament—The Lynn & Ely Railway Co., The Ely & Huntingdon Railway Co., The Lynn & Dereham Railway Co., and the defendants, The Eastern Counties Railway Co.; that The Lynn & Ely Railway Co. had introduced into Parliament, upon their own petition, four bills for purposes connected with their railway; that the three first-named companies had agreed to amalgamate and form one company under the name and style of The East Anglian Railways Co.; and that a bill was then pending in Parliament to give effect to such agreement. The declaration then states that the defendants, by an indenture under their common seal, between themselves and the plaintiffs (comprehending the three first-named companies, since amalgamated by act of Parliament), covenanted with the plaintiffs, among other things, to take a lease of their railways, upon certain terms mentioned in the indenture, and to find the capital necessary for the construction of the extensions, branches, and works authorized to be constructed by the bills then pending in Parliament, and to pay the costs of preparing and promoting such bills, whether the same should pass into law or not. The declaration further states that the bills were proceeded with; that two were passed; and that the costs of the bills, amounting to a large sum, had not been paid by the defendants to the plaintiffs. //

The defendants set out the indenture upon oyer, and pleaded that the plaintiffs had no authority to grant leases of their railways to the defendants; that they had been unable to obtain acts of Parliament for that purpose; that they had abandoned all intention of so doing; and that several shareholders of the defendant's company, naming them, had not assented to the making or executing the indenture, or the agreement therein contained.

The plaintiffs demurred generally to this plea, and the question for the opinion of the court is, whether, upon this record, the plaintiffs can maintain their action. We are of opinion that they cannot, and that the defendants are entitled to judgment.

The defendants are incorporated by the statute 6 & 7 W. 4. c. cvi., the first section of which enacts that certain persons shall be united into a company for making and maintaining the railway mentioned in that section, and other works by that act authorized, and for other purposes in that act declared, and for that purpose shall be one body corporate by the name and style of "The Eastern Counties Railway Co.," and have perpetual succession, and a common seal.

The third section empowers the company to raise a sum of

¹ The statement of facts has been omitted.—Ed.

money for making and maintaining the said railway, and other works authorized by the act; and the fifth section directs the money so raised to be expended in and toward making and maintaining the said railway, and other works, and in otherwise carrying the act into execution. The money raised on mortgage is to be applied in the same way—section 246; and the profits of the company, after defraying the expenses of making, maintaining, and working the said railway, are to be accounted for and divided among the proprietors of the undertaking—sections 170, 171.

This act is a public act, accessible to all, and supposed to be known to all; and the plaintiffs must, therefore, be presumed to have dealt with the defendants with a full knowledge of their respective rights, whatever those rights may be.

It is clear that the defendants have a limited authority only, and are a corporation only for the purpose of making and maintaining the railway sanctioned by the act; and that their funds can only be applied for the purposes directed and provided for by the statute. Indeed, it is not contended that a company so constituted can engage in new trades not contemplated by their act; but it is said that they may embark in other undertakings, however various, provided the object of the directors be to increase the profits of their own railway.

This, in truth, is the same proposition in another form; for, if the company cannot carry on a new trade, merely because it was not contemplated by the act, they cannot embark in other undertakings not sanctioned by their act, merely because they hope the speculation may ultimately increase the profit of the shareholders. They cannot engage in a new trade, because they are a corporation only for the purpose of making and maintaining The Eastern Counties Railway. What additional power do they acquire from the fact that the undertaking may in some way benefit their line? Whatever be their object, or the prospect of success, they are still but a corporation for the purpose only of making and maintaining The Eastern Counties Railway; and if they cannot embark in new trades, because they have only a limited authority, for the same reason they can do nothing not authorized by their act, and not within the scope of their authority.

Every proprietor, when he takes shares, has a right to expect that the conditions upon which the act was obtained will be performed; and it is no sufficient answer to a shareholder, expecting his dividend, that the money has been expended upon an undertaking which at some remote period may be highly beneficial to the line. The public also has an interest in the proper administration of the powers conferred by the act. The comfort and safety of the line may be seriously impaired if the money supposed to be

necessary, and destined by Parliament for the maintenance of the railway, be expended in other undertakings not contemplated when the act was obtained, and not expressly sanctioned by the legislature.

The cases in equity which have been cited proceeded upon this view of the subject, and were decided not because the particular act restrained by injunction was a breach of trust, but because it was not within the scope of the directors' authority, was not justified by the statute, and was therefore illegal. In *Colman v. The Eastern Counties Railway Co.*, 10 Beavan, 15, the Master of the Rolls (Lord Langdale) says: "It has been very properly admitted that railway companies have no right to enter into new trades or businesses not pointed out by the acts; but it has been contended that they have a right to pledge, without limit, the funds of the company in the encouragement of other transactions, however various and extensive, provided the object of that liability is to increase the traffic upon the railway, and thereby to increase the profit to the shareholders. There is, however, no authority for anything of that kind." So, in *Salomons v. Laing*, 12 Beavan, 352, he says: "A railway company incorporated by act of Parliament is bound to apply all the moneys and property of the company for the purposes directed and provided for by the act, and for no other purpose whatsoever."

The same principle was adopted by the Lord Chancellor in the case of *Bagshaw v. The Eastern Union Railway Co.*, 2 M'Naght. & G. 389; by Lord Cranworth in *Beman v. Rufford*, as reported in the *Jurist* for this year,¹ and, as we are told, by Vice-Chancellor Turner, in the case of *The Great Northern Railway Co. v. The Eastern Counties Railway Co.* In the last two cases, the learned judges treated questions similar to the present as purely legal questions, and therefore directed cases to be stated for the opinion of a court of law; but, at the same time, expressed their opinion that the contracts were illegal, and therefore void.

If the contract is illegal, as being contrary to the act of Parliament, it is unnecessary to consider the effect of dissentient shareholders; for, if the company is a corporation only for a limited purpose, and a contract like that under discussion is not within their authority, the assent of all the shareholders to such a contract, though it may make them all personally liable to perform such contract, would not bind them in their corporate capacity, or render liable their corporate funds. 2.

But it is said that it does not sufficiently appear upon this record that the bills in Parliament, and for which the defendants covenanted to pay the costs, were not connected with the defendants'

¹ 15 *Jurist*, 914.

railway. If railway companies could embark in undertakings collateral to their main line, merely because the main line might in the result be benefited, there would be much in this objection; but, upon the view which we have above expressed, the objection cannot prevail.

We know that each of the four litigant companies has a separate act of Parliament; we know that the statute incorporating the defendants' company gives no authority respecting the bills promoted by the plaintiffs; and we are, therefore, bound to say that any contract relating to such bills is not justified by the act of Parliament, is not within the scope of the authority of the company as a corporation, and is therefore void.

For these reasons we are of opinion that there ought to be judgment for the defendants.

Judgment for the defendants.

SAMUEL PEARCE, PLAINTIFF IN ERROR, v. THE MADISON
& INDIANAPOLIS RAILROAD CO. AND THE PERU &
INDIANAPOLIS RAILROAD CO.

IN THE SUPREME COURT OF THE UNITED STATES, DECEMBER
TERM, 1858.

[Reported in 21 Howard 441.]

THIS case was brought up by writ of error from the Circuit Court of the United States for the District of Indiana.

The case is stated in the opinion of the court.

It was submitted, on printed arguments, by *O. H. Smith* and *Fox* for the plaintiff in error, and *Hendricks* for the defendants. *CAMPBELL, J.*, delivered the opinion of the court.

The defendants are separate corporations, existing under the laws of Indiana, and were created to construct distinct lines of railroad that connect at Indianapolis, in that State. The plaintiff is the assignee of five promissory notes that were executed under conditions set forth in the declaration, and of which he had notice. The two corporations (defendants), some time before the date of the notes, were consolidated by agreement, and assumed the name of the Madison, Indianapolis & Peru Railroad Co., and under that name, and under a common board of management, conducted the business of both lines of road.

While the business of the two corporations was thus directed and managed, the president of the consolidated company gave these notes in its name in payment for a steamboat, which was to

be employed on the Ohio River, to run in connection with the railroads. After the execution of the notes, and the acquisition of the boat, this relation between the corporations was dissolved by due course of law, and, at the commencement of the suit, each corporation was managing its own affairs. The plaintiff claims that the two corporations are jointly bound for the payment of the notes, but the Circuit Court sustained a demurrer to the declaration.

The rights, duties, and obligations of the defendants are defined in the acts of the legislature of Indiana under which they were organized, and reference must be had to these to ascertain the validity of their contracts. They empower the defendants respectively to do all that was necessary to construct and put in operation a railroad between the cities which are named in the acts of incorporation. There was no authority of law to consolidate these corporations, and to place both under the same management, or to subject the capital of the one to answer for the liabilities of the other; and so the courts of Indiana have determined. But in addition to that act of illegality the managers of these corporations established a steamboat line to run in connection with the railroads, and thereby diverted their capital from the objects contemplated by their charters, and exposed it to perils, for which they afforded no sanction. Now, persons dealing with the managers of a corporation must take notice of the limitations imposed upon their authority by the act of incorporation. Their powers are conceded in consideration of the advantage the public is to receive from their discreet and intelligent employment, and the public have an interest that neither the managers nor stockholders of the corporation shall transcend their authority. In *McGregor v. The Official Manager of the Deal & Dover Railway Co.*, 16 L. & Eq. 180, it was considered that a railway company incorporated by act of Parliament was bound to apply all the funds of the company for the purposes directed and provided for by the act, and for no other purpose whatever, and that a contract to do something beyond these was a contract to do an illegal act, the illegality of which, appearing by the provisions of a public act of Parliament, must be taken to be known to the whole world. In *Coleman v. The Eastern Counties Railway Co.*, 10 Beavan, 1, Lord Langdale, at the suit of a shareholder, restrained the corporation from using its funds to establish a steam communication between the terminus of the road (Harwich) and the northern ports of Europe. The directors of the company vindicated the appropriation as beneficial to the company, and that similar arrangements were not unusual among railway companies. Lord Langdale said: "Ample powers are given for the purpose

of constructing and maintaining the railway, and for doing all those things required for its proper use when made. But I apprehend that it has nowhere been stated that a railway company, as such, has power to enter into all sorts of other transactions. Indeed, it has been very properly admitted that railway companies have no right to enter into new trades or businesses not pointed out by the acts. But it has been contended that they have a right to pledge, without limit, the funds of the company for the encouragement of other transactions, however various and extensive, provided that the object of that liability is to increase the traffic upon the railway, and thereby to increase the profit to the shareholders.

"There is, however, no authority for anything of that kind. It has been stated that these things, to a small extent, have been frequently done since the establishment of railways; but unless the acts so done can be proved to be in conformity with the powers given by the special acts of Parliament, under which those acts are done, they furnish no authority whatever. In the *East Anglian Railway Co. v. The Eastern Counties Railway Co.*, 11 C. B. 803, the court say the statute incorporating the defendants' company gives no authority respecting the bills in Parliament promoted by the plaintiffs, and we are therefore bound to say that any contract relating to such bills is not justified by the act of Parliament, is not within the scope of the authority of the company as a corporation, and is therefore void."

We have selected these cases to illustrate the principle upon which the decision of this case has been made. It is not a new principle in the jurisprudence of this court. It was declared in the early case of *Head v. Providence Insurance Co.*, 2 Cr. 127, and has been reaffirmed in a number of others that follow it. *Bank of Augusta v. Earle*, 13 Pet. 519; *Perrine v. Ches. & Ohio Railroad Co.*, 9 How. 172.

It is contended, that because the steamboat was delivered to the defendants, and has been converted to their use, they are responsible.¹ It is enough to say in reply to this that the plaintiff was not the owner of the boat, nor does he claim under an assignment of the owner's interest. His suit is instituted on the notes, as an endorsee; and the only question is, had the corporation the capacity to make the contract in the fulfilment of which they were executed? The opinion of the court is, that it was a departure from the business of the corporation, and that their officers exceeded their authority.

Judgment affirmed.

¹ So much of the opinion as relates to this question should be considered in connection with the cases *infra*, pp. —Ed.

GEORGE H. DAVIS AND OTHERS v. OLD COLONY RAILROAD CO.

SAME v. SMITH AMERICAN ORGAN CO.

IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS, JUNE 28, 1881.

[*Reported in 131 Massachusetts Reports 258.*]

GRAY, Ch. J. These actions are brought upon an agreement signed by the Old Colony Railroad Co. in the sum of \$6000, and by the Smith American Organ Co. in the sum of \$5000, and by other corporations, partnerships and individuals in various sums, amounting in all to more than \$200,000.

The agreement is in these words: "Boston, January 23, 1872. We the undersigned subscribers hereby agree, each with the other, that we will contribute toward any deficiency (should there be one) that may arise toward defraying the expenses of the World's Peace Jubilee and International Musical Festival, to be held in Boston, commencing on the 17th of June and closing on the 4th of July next, in such proportions as the amounts affixed to our several names bear to the whole amount subscribed; provided that no subscription shall be binding until the whole amount subscribed shall reach the sum of two hundred thousand dollars, and that no expenditure be incurred except under the authority of the executive committee, which committee shall represent the subscribers, and consist of ten or more persons, who may be chosen by the first six subscribers hereto."

At the trial of the first action, the plaintiffs offered to prove that the signature of each corporation was made by authority of its directors, with the reasonable belief that the holding of the festival proposed would be of great pecuniary benefit to the corporation by increasing its proper business, and that the signature would promote such holding; that the festival was held as mentioned in the agreement of guaranty; and that the reasonable expenditures therefor, made under authority of the plaintiffs, who relied upon that agreement in making them, exceeded the receipts by more than \$200,000.

The only point argued and decided when one of these cases was before us upon demurrer to the declaration was, that the promise of the subscribers was to the executive committee there-mentioned, and that these plaintiffs as such committee were the proper parties to sue thereon. *Davis v. Smith American Organ Co.*, 117 Mass. 456.

The principal question now presented by the answer, and which lies at the threshold of each case, is whether it was within the

power of the defendant corporation to bind itself by such an agreement. Upon full consideration of the elaborate arguments of counsel upon that question the court is of opinion that the agreement is *ultra vires*, and therefore no action can be maintained upon it against either defendant.

The reported cases on the subject are so numerous, that we shall refer to comparatively few of them, except the principal cases in England and the decisions of the Supreme Court of the United States and of this court.

A corporation has power to do such business only as it is authorized by its act of incorporation to do, and no other. It is not held out by the Government, nor by the stockholders, as authorized to make contracts which are beyond the purposes and scope of its charter. It is not vested with all the capacities of a natural person, or of an ordinary partnership, but with such only as its charter confers. If it exceeds its chartered powers, not only may the Government take away its charter, but those who have subscribed to its stock may avoid any contract made by the corporation in clear excess of its powers. If it makes a contract manifestly beyond the powers conferred by its charter, and therefore unlawful, a court of chancery, on the application of a stockholder, will restrain the corporation from carrying out the contract; and a court of common law will sustain no action on the contract against the corporation.

Every person who enters into a contract with a corporation is bound at his peril to take notice of the legal limits of its capacity, especially where, as in this commonwealth, all acts of incorporation are deemed public acts, and every corporation organized under general laws is required to file in the office of the Secretary of the commonwealth a certificate showing the purpose for which the corporation is constituted. Gen. Stats. c. 3, § 5; Stat. 1870, c. 224, §§ 7, 11; *Whittenton Mills v. Upton*, 10 Gray, 582, 598; *Richardson v. Sibley*, 11 Allen, 65, 72; *Pearce v. Madison & Indianapolis Railroad*, 21 How. 441, 443; *East Anglian Railways v. Eastern Counties Railway*, 11 C. B. 775, 811; *Ashbury Railway Carriage & Iron Co. v. Riche*, L. R. 7 H. L. 653.

There is a clear distinction, as was pointed out by Campbell, J., in *Zabriskie v. Cleveland, Columbus & Cincinnati Railroad*, 23 How. 381, 398; by Hoar, J., in *Monument Bank v. Globe Works*, 101 Mass. 57, 58, and by Lord Chancellor Cairns and Lord Hath-erley in *Ashbury Railway Carriage & Iron Co. v. Riche*, L. R. 7 H. L. 668, 684, between the exercise by a corporation of a power not conferred upon it, varying from the objects of its creation as declared in the law of its organization, of which all persons dealing with it are bound to take notice, and the abuse of a general

power, or the failure to comply with prescribed formalities or regulations, in a particular instance, when such abuse or failure is not known to the other contracting party.¹

The Old Colony Railroad Co. is a railroad corporation established by public statutes of the commonwealth for the purpose of constructing and maintaining a railroad and carrying passengers and freight thereon. Stats. 1844, c. 150; 1854, c. 133; 1862, c. 149; 1872, c. 143. The holding of a "world's peace jubilee and international musical festival" is an enterprise wholly outside the objects for which a railroad corporation is established; and a contract to pay, or to guarantee the payment of, the expenses of such an enterprise is neither a necessary nor an appropriate means of carrying on the business of the railroad corporation, is an application of its funds to an object unauthorized and impliedly prohibited by its charter, and is beyond its corporate powers. Such a contract cannot be held to bind the corporation, by reason of the supposed benefit which it may derive from an increase of passengers over its road, upon any grounds that would not hold it equally bound by a contract to partake in or to guarantee the success of any enterprise that might attract population or travel to any city or town upon or near its line. It follows that in the first of the actions before us there must be judgment for the defendant. *dec.*

The same reasons are no less applicable to manufacturing and trading corporations, established under general laws, and the purposes of which are required by those laws to be stated in their articles of association. The Smith American Organ Co. was organized under the general act of 1870, c. 224, and the purposes of its incorporation are limited by its articles of association, as appearing in the certificate thereof filed in the office of the Secretary of the commonwealth pursuant to that act, to "the manufacture and sale of reed organs and other musical instruments." The power to manufacture and sell goods of a particular description does not include the power to partake in, or to guarantee the profits of, an enterprise that may be expected to increase the use of or the demand for such goods. The case of Ashbury Railway Carriage & Iron Co. v. Riche, before cited, is directly in point.

This ground being decisive of the second action, it becomes unnecessary to consider the other objections to its maintenance, and the plaintiffs' exceptions must be overruled.

M. F. Dickinson, Jr., and J. Fox for the plaintiffs.

J. H. Benton, Jr., for the defendant in the first case.

R. D. Smith, C. Allen with him, for the other defendant.

¹ A portion of the opinion containing a citation and discussion of numerous cases has been omitted.—Ed.

LUCAS, CASHIER, ETC., v. THE WHITE LINE TRANSFER CO.

IN THE SUPREME COURT OF IOWA, DECEMBER 23, 1886.

[Reported in 70 Iowa Reports 541.]

ACTION by plaintiff to recover contribution as co-surety on a bond. Defendant answered. Plaintiff demurred to the answer. The demurrer was sustained, and the defendant appeals. Facts necessary to an understanding of the case appear in the opinion.

Cummins & Wright for appellant.

Goode & Phillips for appellee.

ROTHROCK, J.—I. The petition shows that the Valley National Bank and White Line Transfer Co. are corporations organized under the laws of Iowa; that for the purpose of securing to the Philip Best Brewing Co. payment for such beer as Leach & McCullum should purchase of said brewing company, said bank by its cashier and said transfer company by its secretary, J. O. Perrin, became sureties for said Leach & McCullum in a bond for \$1500 made to said brewing company, as obligees; that subsequently the said Leach & McCullum failed in business, and refused to pay their indebtedness to the brewing company, and on May 27, 1884, executed their note to the said bank and transfer company, payable on demand, and in consideration of the payees therein assuming to pay \$1500 to said brewing company; that on May 28, 1884, the following letter was directed to and accepted by the brewing company:

*"Philip Best Brewing Co., Milwaukee, Wisconsin—*DEAR SIR: By an arrangement with Leach & McCullum, and in view of the fact that we were sureties to you for them, we have assumed fifteen hundred dollars (the measure of our obligations as sureties) of their indebtedness to you.

Very respectfully, etc.,

"W. D. LUCAS, Cashier.

"WHITE LINE TRANSFER CO.,

"P. J. MILLS, President."

That on the 30th day of September, 1884, the brewing company made demand for the sum of \$1500 and interest, and plaintiff, after requesting the transfer company to pay its half thereof, and its refusing to do so, paid to said brewing company, "on said suretyship," the sum of \$1572.51; that on the 28th day of May, 1884, suit in attachment was brought in the name of plaintiff and defendant, and against Leach & McCullum, on the said note, dated May 27, 1884, and judgment recovered thereon; that the amount

paid to the brewing company exceeds the amount realized from the attachment proceedings by the sum of \$1267.79; that the interest thereon is \$35.56, making a total of \$1303.35; that general execution was issued in the judgment against Leach & McCullum, and returned *nulla bona*. Wherefore the plaintiff claims that the transfer company, as co-surety in said bond, should contribute one half the last named sum, being \$651.67, and asks judgment therefor.

The plaintiff attached to the petition a copy of the bond to the brewing company signed by the firm and individual names of Leach & McCullum, and also signed: "W. D. Lucas, Cashier. White Line Transfer Co., J. O. Perrin, Secretary." There are also attached copies of attachment, and indemnifying bonds given in the attachment proceedings, signed by Lucas, cashier, and the transfer company, as above, and also copies of pleadings and stipulations in said attachment proceedings, signed by attorneys purporting to act for both the bank and the transfer company, who were joined as plaintiffs in said attachment proceedings.

The White Line Transfer Co., the defendant, filed an answer, stating, in substance, that the sole object of its organization was to engage in the "general freight and transfer business;" that it had no power or authority to become surety for the debt of another; that the secretary of said company, in signing the name of the defendant to the bond given to the brewing company, and the president of the company, in signing the name of defendant to the letter of May 28, 1884, did so without authority from the directors or stockholders of the defendant, and without the knowledge, on the part of many of them, that such signatures had been or were to be made; that the note executed by Leach & McCullum, dated May 27, 1884, payable to plaintiff and defendant, was so taken by plaintiff without any knowledge on the part of defendant's officers or stockholders until some time after said note was in the possession of the plaintiff; and that the attachment suit and proceedings based on said note were commenced and carried on without the knowledge of a large number of defendant's stockholders, who held a large share of the stock. The answer further states that the company never received, directly or indirectly, anything for signing said bond or letter, or on account of said attachment proceedings; that neither itself nor its officers had any authority to sign the contracts, or do the acts alleged in plaintiff's petition; and that said contracts were and are *ultra vires*. To the answer was attached a copy of defendant's articles of incorporation, in which appears the following article: "(3) *Object*. Said corporation shall have power to engage in the general freight and

transfer business, and such other business as may not be inconsistent therewith."

To this answer the plaintiff filed a demurrer, on the grounds that by reason of the matters set out in the petition, and exhibits thereto, and by reason of the taking of said note in favor of plaintiff and defendant, and the proceedings therein, as set forth, defendant was estopped from setting up the plea of *ultra vires*; and that the fact that some of the stockholders did not know of the proceedings would not relieve the defendant from liability.

P. J. Mills and J. O. Perrin being made parties defendant, each demurred to the petition on the ground that, on the face of the petition itself, it appeared that they had not signed any of the obligations as individuals, and that the petition itself made no personal claim against them.

The court below sustained the demurrer to the answer, and rendered judgment in favor of plaintiff, on default for want of answer, for the sum of \$268.02, and interest. From this ruling and judgment the defendant appeals. The court also sustained the demurrers of J. O. Perrin and P. J. Mills, and from this ruling the plaintiff appeals.

As to the last ruling, we think the Circuit Court should be sustained, as the petition does not state, nor attempt to state, a cause of action against Perrin and Mills as individuals.

II. The principal question involved in the appeal is the ruling on the demurrer interposed by plaintiff against defendant's answer. It is true, the demurrer seems to be based on the idea solely that, by the conduct of the defendant subsequent to signing the original bond, it has estopped itself from setting up the plea of want of power or authority to sign the bond. The two following propositions are proper to be considered: (1) Had the officers of the defendant power to bind the corporation by placing its name on the bond in question? (2) If they had no such power, has the corporation, or its officers, so acted in relation thereto subsequently, as to prevent or estop the corporation from now setting up the plea of want of power?

The corporation defendant is acting under the general incorporation laws of the State, and from the provisions of its articles and the statute it derives its power. A corporation exists and exercises its franchise only by virtue of a grant from the legislative power. The granting and acceptance of a charter in the case of private corporations for pecuniary profit are based on the theory that the prosecution of the business proposed will be a benefit to the public, and that the investment of capital therein will result in pecuniary profit to the stockholders, and that it is an undertaking, on the part of the corporation and all of its stockholders, that, in

consideration of the grant of power, the capital shall be used for the prosecution of the purpose named in the charter, and no other. There is also an undertaking on the part of the corporation with each stockholder that the capital he invests shall be put to no other use, and subject to no other hazard, than that contemplated by the powers expressed in the charter, and that those things which are within the scope or object of the corporation shall be done in the manner pointed out in the charter and the laws governing its action. But corporations and their officers do not always keep within their powers, and the application of the doctrine of *ultra vires* is often attended with very perplexing questions. By the application of a few plain rules, however, we may readily reach the proper answer to the question involved in the case.¹

In the case now before us the plaintiff seeks to recover contribution from the corporation as co-surety on the bond to the brewing company, and claims (1) that the contract of suretyship was within the defendant's corporate powers; and (2) that, if it were not within defendant's corporate powers, it has so acted on the contract as to now estop it from pleading *ultra vires*. It is claimed that the language of the articles of incorporation, defining its business to be "the general freight and transfer business, and such other business as may not be inconsistent therewith," is of such a general character as to cover almost any kind of business. This position, it seems to us, is not tenable; for the language itself implies that there may be business inconsistent with the general freight and transfer business. The name of the corporation indicated its principal business, and the language is equivalent to saying it may do such other business as is consistent with the freight and transfer business. "Consistent" means standing together, or in agreement with. If the capital of the company is diverted into some other line of business entirely foreign to the freight and transfer business, it would be to the detriment of, and therefore not consistent with, the latter. But, whatever meaning may be attached to the language of the articles, it is quite certain it cannot include the contract of suretyship in question. The simple act of going security for another is out of the line of the prosecution of any business. It is a mere accommodation, and it cannot be assumed that the articles gave the officers of defendant any power to jeopardize its capital in any such venture.

It is no part of the ordinary business of commercial corporations, and, *a fortiori*, still less so of non-commercial corporations, to become surety for others. Under ordinary circumstances, without positive authority in this behalf in the grant of corporate power, all engagements of this description are *ultra vires*, whether

¹ A portion of the opinion has been omitted.—Ed.

in the indirect form of going on accommodation bills, or otherwise becoming liable for the debts of others. *Green's Brice, Ultra Vires*, 252; *Madison, etc., Plank-Road Co. v. Watertown, etc., Plank-Road Co.*, 7 Wis. 59.

It seems to us clear that the corporation defendant had no power to make the contract of suretyship in question; and, for the same reasons, it is just as clear that the officers of the corporation had no power to sign the letter of May 27th, purporting to assume the payment of the amount stipulated in the bond. Both instruments, so far as the defendant was concerned, were illegal and void, and no attempted ratification by parties having no power to make the original contract could make it valid, no matter how often such attempts were made. It is questionable, on the authorities, whether even the consent of all the stockholders could make the contract valid, when it was so plainly beyond the powers granted by their corporation, which was, in duty to the legislative authority, held to apply its capital to the prosecution of the business for which it was organized and for which it received the grant of power. But this we need not determine. It is very clear, however, on authority and on principle, that there could not be a ratification without the consent of all the stockholders.

It appears from the record that the note sued on in attachment proceedings, and the proceedings themselves, were taken and carried through without the knowledge or assent of the stockholders or directors, and that the corporation defendant received no benefit therefrom; for whatever was realized therein was applied on the contract of suretyship, which was void as against the defendant, and was so applied by plaintiff or other unauthorized parties. *Tracy v. Guthrie Co. Agr'l Soc.*, 47 Iowa, 27.

It is further claimed that the corporation defendant, by its signature to the bond and letter, induced the plaintiff to become liable on the bond and letter also, and induced plaintiff also to pay the amount of the bond. It is stated, however, in the petition that the defendant refused to pay its half, and it must be borne in mind, in view of what has preceded, that the brewing company and plaintiff were all the while, at and after the time of signing the bond, charged with notice that the officers of defendant were not authorized to bind the defendant, and that attempts to do so on their part were illegal and void; and in this respect defendant's stockholders are innocent parties, while the plaintiff is not.

We are therefore of the opinion that the Circuit Court erred in sustaining the demurrer to the answer of the transfer company, and its ruling thereon is reversed, and the cause remanded.

Reversed.

JOHN A. LESLIE, RESPONDENT, *v.* JACOB LORILLARD
et al., IMPEADED, ETC., APPELLANTS.

IN THE COURT OF APPEALS OF NEW YORK, OCTOBER 16, 1888.

[Reported in 110 *New York Reports* 519.]

APPEAL by defendants Lorillard and the Lorillard Steamship Co. from judgment of the General Term of the Supreme Court in the Second Judicial Department, entered upon an order made May 14, 1888, which affirmed an interlocutory judgment entered upon an order overruling a demurrer to plaintiff's complaint.

The averments of the complaint are substantially as follows:

The plaintiff is a stockholder of the defendant, the Old Dominion Steamship Co., of Delaware. In the year 1873 the Old Dominion Steamship Co., of New York was a corporation organized under the laws of New York, and was engaged in the business of running a line of steamships between the port of New York and certain ports in the State of Virginia. The defendant, the Lorillard Steamship Co., was also a New York corporation organized for the business of navigating the ocean by steamships. The defendant Lorillard was a director and the president of the Lorillard Co., and had entire control of it; the other directors, except one, who was a brother-in-law, being his clerks and employees. In and prior to the summer of 1873, said Lorillard, "for the purpose of extorting large sums of money from the Old Dominion Steamship Co., of New York, stated to the officers of said corporation that the said Lorillard Steamship Co. intended to put on and run a line of steamships, between the ports above mentioned, in opposition to the steamships of said Old Dominion Steamship Co.; and to deceive the officers of said company, and cause them to believe that a formidable opposition would be established against said company, said Lorillard caused said Lorillard Steamship Co. to lease docks at Norfolk and other places, and to hire agents and servants at different points; and in or about the month of October, 1873, said Lorillard caused said Lorillard Steamship Co. to put on and run a line of steamships between said ports in opposition to said Old Dominion Steamship Co., of New York." Said Lorillard continued to run his steamships at great loss, and at his own expense, until his efforts were successful in deceiving the officers of the Old Dominion Co. into the belief that a powerful opposition line had been established; and in January, 1874, an agreement, running between the Old Dominion Co. and Lorillard and his company, was signed by the

president of each company, and by Lorillard for himself, by the terms of which, in consideration of a monthly payment to him, Lorillard and his company agreed to discontinue running their vessels, or any others, between the ports mentioned, and that they would not charter or sell the vessels to any other company or persons to be used on that route, and would not become in any way interested in the running of steamships between those places; that, in February, 1875, the defendant, the Old Dominion Steamship Co., of Delaware, was formed under the laws of that State, and succeeded to the business of the New York company, and "became vested with the property of said last-named company, which was duly conveyed and assigned to it and subjected to the liabilities and contracts of said company." This new company continued making payments to Lorillard under the contract mentioned until February, 1878, when disputes arose between the various parties and a new contract was entered into in October, 1878. By this latter contract the previous contract was cancelled, and in consideration of the payment of a gross sum of money and of certain monthly payments, to be continued through five years from February, 1879, Lorillard and his company again agreed not to run, or to be in any way interested in the running of steamships between the ports named. The Delaware company made all the payments called for under the second agreement up to August, 1881, when further payment of the monthly subsidies was enjoined in an action brought by this plaintiff. Plaintiff alleges that prior to the commencement of this action, and in February, 1884, he requested the Delaware Steamship Co. to pay no more moneys and to commence an action for the cancellation of the contract and for the recovery back of the moneys paid under the contracts. This demand was in a letter, and the reply to it contains a resolution of the board of directors refusing to take the action requested. Plaintiff also alleges the commencement of an action in February, 1884, by Lorillard against the Delaware company, to recover the monthly payments, payable under the contract from and after August, 1881, and that the Delaware company did not intend to defend it.

The relief demanded is an injunction against the Delaware company's making payments under the contract; against Lorillard from prosecuting his action; the cancellation of the contract and the repayment by Lorillard of all moneys received.

Defendants Lorillard and the Lorillard Steamship Co. demurred to the complaint on the ground that it did not state facts constituting a cause of action.

Asa Bird Gardiner for appellants.

Thomas S. Moore for respondent.

GRAY, J. The defendants Lorillard and the Lorillard Steamship Co. have demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action. We are thus required to examine this pleading and to see whether, allowing to its averments all the force and truth such a ground of demurrer concedes, it may be sustained as the foundation of an action for equitable relief.

Our decision of the question will necessarily turn upon the validity of the contracts which are set forth. An extended discussion of the principles controlling the making and enforcement of corporate contracts is unnecessary. By frequent adjudications certain principles are well settled and have become familiar.

The contracts of corporations are said to be *ultra vires* when they involve some adventure or undertaking not within the scope of their charter, which is their rule of corporate action. In the granting of charters, the legislature is presumed to have had in view the public interest; and public policy is (as the interest of stockholders ought to be) concerned in the restriction of corporations within chartered limits, and a departure therefrom is only deemed excusable when it cannot result in prejudice to the public or to the stockholders. As artificial creations they have no powers or faculties, except those with which they were endowed when created; and when, as is frequently the case, they act in excess of their powers, the question will be: Is the act prohibited as prejudicial to some public interest, or is it an act not unlawful in that sense, but prejudicial to the stockholders? The rule, however, is well settled that the plea of *ultra vires* should not prevail when it would not advance justice, but, on the contrary, would accomplish legal wrong.

In suits between the corporation and strangers dealing with it the question is whether the act is one the corporation is not authorized to perform under any circumstances; or one that it may perform for some purposes or under certain conditions. In the first case it is *ultra vires* and there can be no recovery; because the party dealing with the corporation is bound to know, from the law of its existence, that it has no power to perform it. In the second case, the issue will turn upon whether the party dealing with it is aware of the intention to perform the act for some unauthorized purpose, or whether the attendant circumstances justify its performance. In actions by stockholders, which assail the acts of their directors or trustees, courts will not interfere unless the powers have been illegally or unconscientiously executed, or unless it be made to appear that the acts were fraudulent or collusive and destructive of the rights of the stockholders. Mere

errors of judgment are not sufficient as grounds for equity interference; for the powers of those entrusted with corporate management are largely discretionary.

Testing by these rules the case made by plaintiff in his complaint, we find, in considering that pleading, that the only respect in which the contracts in question could be viewed as prejudicial to public interests, and, therefore, become the subject of judicial condemnation, as being against public policy, would be that they were in restraint of competition and tended to create a monopoly.¹

The conclusion at which we have arrived, as to these contracts, would seem to dispose of this case and make further consideration useless; for the plaintiff makes them the basis of his action. The relief he has sought is the prevention of a misappropriation of corporate funds by the officers of the company, and the annulment of these contracts as obtained by deception.

We do not question the right of stockholders to complain of any diversion of the capital and assets to purposes not authorized by the charter, and to arrest by suit an unauthorized course of dealing which results in such diversion. The powers of a court of equity may be put in motion at the instance of a single stockholder, if he can show that the corporation is employing its statutory powers for the accomplishment of purposes not within the scope of its institution. Angell and Ames on Corporations, sec. 393. But this is not such a case.//The contracts were within the power of the corporation to make, and if they were free from the taint of fraud and were not procured to be made by some collusion or conspiracy, then they are binding upon the company and constitute an obligation which the officers must discharge.²

We think as these contracts were not *ultra vires*, or assailable on grounds of public policy, that they were such as came within the discretionary powers of the board of management to make in the interest of the corporation. Within the limits of the chartered authority the officers of a corporation have the fullest power to regulate its concerns according to their best judgment. It is true that the powers conferred upon its agents by the charter of a corporation cannot be transcended by any considerations of expediency which they suppose may result to the stockholders from an act not within the scope of their authority (5 Denio, 567); but these contracts were such as the corporation could legitimately make and consequently came within the scope of the ordinary powers of corporate management.

¹ So much of the opinion as relates to this question has been omitted.—Ed.

² So much of the opinion as relates to the question of fraud and deception has been omitted.—Ed.

The conclusions at which we have arrived render further discussion of the questions in this record unnecessary.

The interlocutory judgment overruling the demurrer should be reversed, the demurrer sustained and the complaint dismissed, with costs.

All concur except RUGER, Ch. J., not voting.

Judgment accordingly.

CHEWACLA LIME WORKS *v.* DISMUKES, FRIERSON
& CO.

IN THE SUPREME COURT OF ALABAMA, DECEMBER TERM, 1888.

[Reported in 87 Alabama Reports 344.]

APPEAL from the Circuit Court of Lee.

Tried before the Hon. Jesse M. Carmichael.

This action was brought by the appellees, suing as partners, against the appellant, a private corporation; and was commenced before a justice of the peace on the 5th of January, 1884. The cause of action, as endorsed on the justice's warrant, was, "\$80, due June 22, 1882, for goods, wares and merchandise sold by plaintiffs to defendant on the 22d of February, 1882, with the interest thereon." On appeal to the Circuit Court, the defendant filed two pleas: the first alleging that the defendant never bought the goods, nor promised or assumed in any manner to pay for them; and the second, that the goods were bought by the Chewacla Lime Co., without authority of law; that the contract was *ultra vires*, and not binding on the defendant as the successor of said Chewacla Lime Co. Issue was joined on both of these pleas. On the trial, as the bill of exceptions shows, the plaintiffs proved the sale of the goods to the Chewacla Lime Co., and their value; and the defendant, after introducing the original act incorporating the Chewacla Lime Co., and the amendatory act changing its name, proved that said corporation, at the time of the sale of the goods, "was keeping a store and carrying on a mercantile business, and bought said goods for the purpose of selling the same at a profit, as other merchants do." The original act of incorporation was approved on the 9th of December, 1862, and the amendatory act on the 15th of February, 1883. The material parts of each are copied in the opinion of this court. This being all the evidence, the court charged the jury, on request, that they must find for the plaintiff, if they believed the evidence. The defendant excepted to this charge, and it is here assigned as error.

Harrison & Ligon for appellant.

John M. Chilton contra.

CLOPTON, J. By an act of the General Assembly, amending the act "to incorporate the Chewacla Lime Co.," the name of the corporation was changed to the "Chewacla Lime Works." The fifth section of the amendatory act provides: "That the said Chewacla Lime Works shall succeed, and does hereby succeed, to all the rights, privileges and immunities, and franchises and property, that was of and belonging to the said Chewacla Lime Co., and shall be subject to all liabilities and charges legitimately due from the said Chewacla Lime Co." Acts 1882-83, p. 369.

This action was commenced in a justice's court, and was brought by appellees to recover the price of goods, which the endorsement on the summons avers were sold to the Chewacla Lime Works, by which name the corporation is sued; while the evidence shows that the goods were sold to the Chewacla Lime Co. before the amendment of the charter. On appeals from judgments of justices of the peace, the cause "must be tried *de novo*, and according to equity and justice, without regard to any defect in the summons or other process, or proceedings before the justice." Code, 1886, § 3405. The corporation, notwithstanding the change of name, is one and the same entity. The averments of the statement of the cause of action might have been more formal, but there is no substantial variance between them and the proof.

It clearly appears that at the time of the sale and delivery of the goods, the corporation was engaged in carrying on a general mercantile business, for which purpose they were bought. The material ground on which the defendant resists a recovery is that the Chewacla Lime Co. had no authority to engage in such business, and that the contract of purchase is *ultra vires*. The question raised involves the application of only a few principles of law, which may be regarded elementary. As corporations derive their existence and capacity from a special statute, or a general law empowering them to organize, they cannot exercise any power, or act in any capacity, not authorized by the act of incorporation, or the general law. A corporation has no implied authority to engage in any business other than the particular enterprise for which it is chartered, or to do any act, or make any contract, not in pursuance of the purposes for which it was created. Authority to carry on a particular business includes authority to conduct it in the usual and customary modes. Within the scope and purview of the chartered powers, the business for which the corporation was chartered may be conducted in the same manner as individuals would conduct the same enterprise under similar circumstances. But any transaction or contract beyond this, not

necessary or proper to enable the corporation to answer the purposes of its creation, is void.

The grant of powers conferred on the Chewacla Lime Co. by the original act of incorporation, on which plaintiffs base the authority, is in the following language: " Shall be, and are hereby made able and capable in law to have, purchase, receive, possess and enjoy, and realize to them and their successors, lands, rights, tenements, hereditaments, goods, chattels, and effects, in any amount the body corporate may deem necessary to carry all the objects of said corporation into full force and effect, which objects are, to mine lime-rock, and manufacture the same; and to keep up and run such machinery as may be necessary to saw lumber and make barrels for the packing of said lime, and the same to sell, devise, grant, alien, and dispose of." Acts, 1862, p. 127. It is manifest that the act of incorporation grants no express authority to engage in a general mercantile business. Is there implied authority? The declared objects of the corporation are the mining and manufacture of lime-rock, and putting the product in a marketable condition. These purposes constitute limitations upon the exercise of the express and implied powers. There may be circumstances under which a manufacturing company would have implied authority to connect a supply store with the business of the corporation as being ancillary thereto. In such case the real and primary object must be auxiliary to the main enterprise of the corporation, for the purpose of providing supplies for the employees and laborers, founded on necessity arising from situation and condition. No circumstances are shown which bring the present case within this exception. A general mercantile business does not pertain to the purposes of mining and manufacturing lime-rock. They are separate and distinct in their nature and objects. A coal mining company has no implied authority to buy coals in the market for the purpose of re-sale as a speculation. *Alexander v. Caldwell*, 83 N. Y. 480. A corporation authorized and organized to manufacture lime cannot buy lime manufactured elsewhere for the purpose of trade, in order to raise funds to carry on the corporate business. As well might such corporation engage in any other distinct business as that of merchandising, because it may be deemed profitable, and will thus contribute, indirectly, to promote the objects of the corporation. A general mercantile business, being a distinct branch of business, the Chewacla Lime Co. had no authority, express or implied, to engage in carrying on the same.

The established rule in this State is that a corporation is not estopped, by reason of having received the benefits of a contract which is *ultra vires*, from setting up its invalidity in defense of a

suit brought to enforce it. *Sherwood v. Alvis*, 83 Ala. 115; S. C. 3 Amer. St. Rep. 695.¹

The Circuit Court erred in giving the affirmative charge in favor of the plaintiffs.

Reversed and remanded.

VERNON H. BROWN AND ANOTHER v. WINNISIMMET CO.

IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS, NOVEMBER SESSION, 1865.

[Reported in 11 Allen 326.]

CONTRACT. The declaration was on an account annexed, one item being a charge of \$1650 for "one half cash due and paid by the United States Government for charter money of steam ferry-boat Winnisimmet, forty-four days at two hundred dollars per day, after deducting one hundred and twenty-five dollars to be retained by said company." The second item was a charge of \$468.23 for cash paid by the plaintiffs for commission for procuring said charter, and interest.

At the trial in the Superior Court, before Russell, J., the plaintiffs put in evidence the following agreement:

"The Winnisimmet Company will charter their iron ferry-boat Winnisimmet at one hundred and twenty-five dollars per day free of all commissions to Brown & Wilde, they to recharter at highest obtainable rate, returning to said Winnisimmet Company one-half of any excess received over one hundred and twenty-five dollars per day, now in perfect running order and ready to leave at a day's notice. N. Matthews, Treasurer. Boston, August 8, 1862."

The plaintiffs also contended that by a subsequent agreement the defendants promised to pay one-half the commissions paid to a Philadelphia broker, provided the steamboat could be chartered for two hundred dollars a day.

At the time of making the above contract, it was understood that she was to be rechartered to the United States, for service in the war.

The plaintiffs then introduced testimony that, upon receiving said instrument, they employed brokers in Philadelphia through

¹ So much of the opinion as relates to this question should be considered in connection with the cases *infra*, pp. —Ed.

whom a charter was made of said vessel to the United States Government at two hundred dollars per day; and that said vessel was by telegraph ordered to be sent instantly, without waiting for charter parties; that this was communicated to the treasurer of the defendants' corporation and the superintendent thereof, and the captain of the boat was sent to the plaintiffs to receive orders for her outfit and sailing instructions; that the plaintiffs gave such orders and instructions, superintended personally her outfit and cleared her at the Custom House for Fortress Monroe, there to report to the United States quartermaster, and that said vessel sailed in the service of the United States on the 14th of August, and was retained forty-four days at the rate of two hundred dollars per day.

It was further in evidence that on the 30th of August, 1862, the plaintiffs wrote to their said brokers in Philadelphia as follows:

"We received your telegram as follows, late last evening: 'Telegraphed us whose names, and to whom payable charters steamers to be made.' We telegraphed to you to-day as follows: 'Winnisimmet, owned by Winnisimmet Company, payable Nathan Matthews, boat valued \$32,000.'"

On the return of the steamboat a charter party was necessary for the collection of the money for her service, and there was difficulty in making such collection, from the failure of the master to bring home proper vouchers or certificates for the service rendered by him, for which neglect the plaintiffs contended that the defendants were responsible.

No charter was executed until after the steamboat had left the service of the United States, but the charter was then made, from directions previously given by the plaintiffs, in the name of the defendants, and the charter money was payable to the order of the defendants' treasurer. The money, at the rate of two hundred dollars a day, was collected by the defendants and duly entered in their book, and the jury found specially that there was a subsequent implied agreement between the plaintiffs and the defendants by which the latter undertook to collect the money due from the Government.

The defendants requested the court to rule that the above was not sufficient evidence to warrant the jury in finding that the defendants' treasurer was authorized to make the agreements under which the plaintiffs claim, or to find that the same had been ratified by the defendants. The judge instructed the jury that there was no evidence of antecedent authority, but that there was evidence which would justify them in finding that the agreements were ratified, and left the question of fact to them.

The defendants also requested the court to rule that the agree-

ments relied on by the plaintiffs were not authorized by the defendants' charter, and were void; but the judge declined so to rule.

The jury returned a verdict for the plaintiffs, with \$1887.31 damages; and the defendants alleged exceptions.

P. W. Chandler and *G. O. Shattuck* for the defendants.

If the corporation had power to make this contract, the treasurer had none. *E. Carver Co. v. Manuf. Ins. Co.*, 6 Gray, 214. *Ashuelot Manuf. Co. v. Marsh*, 1 Cusi. 507. Neither the company nor its officers could lease its boats. There is no resemblance between such an act and a sale of surplus stock or old boats. If the act was illegal, it cannot be ratified. It is said the defendants are liable because they have got the money. But it is a familiar rule as to executed contracts for unlawful purposes, that the law will not interfere. But there is no evidence of a ratification of the contract with the plaintiffs. We may admit that there was a valid contract with the United States; but the plaintiffs set up a contract to pay them. Where is the evidence of a ratification of that contract? There is no evidence that the officers of the company, except the treasurer and the master of the steamboat, knew that the plaintiffs had anything to do with it.

E. D. Sohier and *J. D. Bryant* for the plaintiffs.

Per We have no occasion now to examine at length into the correctness of this doctrine, or to ascertain with precision its proper limitations or operation, because we are of opinion that the defendants do not bring the case at bar within any recognized application of the rule. Looking only at the words of the act by which the defendants were incorporated, Stat. 1833, c. 197, we are unable to say that the contracts on which the plaintiffs rely are so far foreign to the object for which a charter was granted to the defendants as to require us to declare them to have been *ultra vires* and illegal, and that no action upon them can be maintained in a court of law. In the absence of all evidence of extraneous facts, and taking the case as it was presented at the trial, on a comparison of the contracts set up by the plaintiffs with the act incorporating the defendants, it appears to us that the scrupulous care and anxiety to keep within the limit of their corporate powers, which the defendants now manifest, will not avail them in defense of this action, although it may induce them to exercise a greater caution in entering into contracts which they cannot fulfil without violating their charter. They were incorporated with power to establish, continue, and maintain a ferry between the city of Boston and the town of Chelsea, and were authorized to own, hold, and possess vessels, steamboats, and such other personal property, not exceeding in value one hundred thousand dollars,

as might be necessary and convenient for the better management of such ferry and of the affairs of said corporation. There can be no doubt that under this charter the main purpose for which the defendants were incorporated was to carry on the transportation of persons, vehicles, merchandise, and other articles by means of a ferry across Charles River between the points designated in the act. All else was to be subordinate and incidental to this main design. So far, the argument urged in behalf of the defendants is sound and irrefragable.

But the next step is not so easily taken, nor does it lead to the point at which the defendants seek to arrive. It was not shown at the trial that the steamboat which was the subject of the contracts with the plaintiffs was not a necessary and proper vessel to be used by the defendants in the prosecution of the business of their ferry, nor that by reason of its ownership they had exceeded the limit of personal property which they were empowered by their charter to hold. Nor could it be properly inferred that it was not reasonably required for the legitimate business of the corporation, because it was not in actual use by them on the ferry at the time the contract for letting it was entered into with the plaintiffs, and because it was chartered under that contract for the use of the Government of the United States. Such an inference could be made only on the theory that the defendants were so restricted by their charter that they could not hold any greater number of vessels or steamboats than were absolutely required for present or immediate and constant use on their ferry, or, if they could be allowed to possess a larger number, that they could not use or employ them in any other business or for any other purpose whatever, but must suffer them to remain at their wharf to decay or deteriorate for the want of use, or, at least, in a condition in which they could be of no advantage to themselves or others. But we think such a narrow and restricted construction of the powers granted to the defendants is inconsistent with any reasonable view of the intention of the legislature in conferring on them a corporate franchise, and is not required by any considerations of justice or sound policy. On the contrary, we cannot doubt that under their charter they are authorized to hold any amount or kind of personal property, within the limit of value fixed by the act, which they may deem necessary or expedient for the proper conduct and management of the business of the ferry; ~~that~~ it is no excess of their corporate powers to own steamboats which are not required for immediate or constant use in the daily prosecution of their ordinary business, but which may be convenient or useful in case of sudden emergency or accident, or when those which are employed in the regular

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service of the ferry might be withdrawn for repairs; that it is not necessary that such extra or additional steamboats should be kept unemployed when not required for the business of the ferry, but that it is competent for the defendants to use them or to let them to others to be used in carrying on any legitimate business for which they are suitable, such as the towage of vessels and the transportation of passengers or merchandise, so long as such use is only temporary and incidental to the main purpose for which they are owned by the defendants. //

We know of no rule or principle by which an act creating a corporation for certain specific objects or to carry on a particular trade or business is to be strictly construed as prohibitory of all other dealings or transactions not coming within the exact scope of those designated. Undoubtedly the main business of a corporation is to be confined to that class of operations which properly appertain to the general purposes for which its charter was granted. But it may also enter into contracts and engage in transactions which are incidental or auxiliary to its main business, or which may become necessary, expedient, or profitable in the care and management of the property which it is authorized to hold under the act by which it was created. For example, it might perhaps be held that a corporation established for the purpose of manufacturing cotton and woollen cloth could not properly invest all its capital in mill powers and privileges, and engage exclusively in the business of leasing them to others to be used for manufacturing purposes, or that it could not lawfully confine its operations to the making of steam-engines and machines for sale. But no one could doubt that it would be within the scope of its powers to allow another person or corporation, for a reasonable compensation, to draw surplus water from its mill-pond, or to employ that portion of its steam power which was not required for its own use. So a stage-coach company or a street railway corporation would exceed its corporate powers if it engaged extensively in the transportation of passengers and merchandise on land or sea by steam; but it would be acting strictly within the limits of its capacity if it should occasionally let a horse or a coach or car, not required for its own immediate purposes, to another person or corporation, or should enter into a contract for the employment of its horses in another occupation during a portion of the year when the business of the corporation did not require their use. We can see no substantial difference between transactions of this character and that which the defendants entered into when they made the contracts with the plaintiffs.

These views of the extent of the authority granted to the de-

fendants by the legislature are a decisive answer to then defense relied on by them at the trial. The steamboat, under the contract with the plaintiffs, was let to the United States in a season of great public exigency, for military purposes; the defendants did not part with her control for any definite period of time, but only from day to day, nor did they send her to a great distance, where she could not be speedily recalled. The defendants retained the right and power to resume the possession and use of her at any moment. In this state of facts, we are of opinion that the court below took a correct view of the law, and was right in refusing to rule, as requested by the defendants, that the contracts entered into with the plaintiffs were not authorized by the defendants' charter, and were therefore void.

Exceptions overruled.

LYNDEBOROUGH GLASS COMPANY v. MASSACHUSETTS GLASS COMPANY.

IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS,
JANUARY TERM, 1873.

[*Reported in 111 Massachusetts Reports 315.*]

CONTRACT on an account annexed, the items of which were for glassware sold and delivered. Trial in the Superior Court before Brigham, Ch. J., without a jury, who reported the case for the consideration of this court substantially as follows:

The defendants were incorporated in 1867 under the Gen. Stats. c. 61. The articles of association, which were signed by Samuel Oakman, George W. Pinkerton, J. Wade Davis, Joseph H. Orcutt, and George W. Park, stated that the company was incorporated "for the purpose of manufacturing and selling all the varieties of glass." The five signers of the articles subscribed for all the stock. At the first meeting of the corporation, held on May 24, 1867, George W. Pinkerton was chosen treasurer and the other stockholders directors; and by-laws were adopted, one of which was as follows: "The directors shall have the general supervision and control of the affairs of the corporation; they may appoint and regulate the powers and duties of such agents and operatives as may be necessary in carrying on the business of the corporation." At the first meeting of the directors, held on the same day, Oakman was chosen president; and on June 5, 1867, the directors voted that George H. Smith should be employed as superintendent of works.

The defendants succeeded a former company of the same name, whose furnaces and machinery were transferred to them upon their organization. Immediately after the organization was completed, the defendants opened an office in Boston and displayed samples of glassware therein for sale. Repairs upon the furnace and machinery were commenced, but were not completed so as to enable the defendants to begin the manufacture of glass there until November 1, 1867. After the office was opened Smith, holding himself out as acting, and assuming to act as agent of the defendants, solicited and received orders for glassware in behalf of the defendants, and the ware furnished by the plaintiffs was contracted for by Smith to fill the orders thus received. These transactions were engaged in by Smith with the knowledge and approval of Oakman and Pinkerton; and Orcutt and Davis had a general knowledge of them, and made no objection thereto. The purpose of these transactions was to establish a trade on which the defendants could rely when their works should be in operation, and to fill orders accepted for the defendants, for the purpose of retaining the old customers of a former company of the same name, and obtaining new ones for the trade of the defendants when their works were ready. The goods purchased from the plaintiffs were designed to be sold again, and not to be used by the defendants in their manufacturing business. They were purchased under an agreement between the plaintiffs and Smith, purporting to act as agent of the defendants.

There was no vote of the defendants or of the directors authorizing the making of this agreement with the plaintiffs or sanctioning or adopting the same, but the officers who had part in the transactions assumed to act *bona fide* as the agents of the defendants therein, and held themselves out as thus acting. All the stockholders knew of these transactions soon after the last of them took place and before suit was brought, and no action or vote was ever taken by the defendants or the directors repudiating them.

Upon these facts the judge ruled that the plaintiffs were entitled to recover, and found a verdict for them. If upon the facts reported such ruling and finding should be sustained, judgment to be entered upon the verdict; otherwise, judgment for the defendants.

G. W. Park for the defendants.

G. Stevens and *W. H. Anderson* for the plaintiffs.

MORTON, J. In this case trial by jury was waived in the Superior Court, and it was heard before the presiding justice, who found for the plaintiffs. The only question which we can consider is whether this finding can be sustained upon the evidence. There was sufficient evidence to sustain the finding that Smith, who

made the contract for the purchase of the goods sued for, was authorized to do so by the corporation. He was their "superintendent of works," he acted as an agent of the corporation in this purchase, and the goods purchased were received by and went to the benefit of the corporation. A formal vote giving him authority was not necessary. He made the contract with the knowledge and sanction of all of the officers and stockholders, except one, and that one was informed of it soon after the goods were purchased, and no action was ever had repudiating it. There was sufficient evidence to justify a finding either of an original authority or of a subsequent ratification by the corporation. *Sherman v. Fitch*, 98 Mass. 59. //

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But the defendants contend that the corporation had no power or authority to make this contract; that it was *ultra vires*, and therefore cannot be enforced. We think it very clear that it was within the power of the corporation to make such a contract as this. The defendants were incorporated "for the purpose of manufacturing and selling all the varieties of glass." They succeeded a former company which had been engaged in the same business; it was important that they should retain the old customers. They were repairing their manufactory and machinery, and these goods were bought to keep up their stock and enable them to fill orders from their customers until they could supply themselves from their own manufactory. Such purchases are auxiliary and incidental to the main purposes of their incorporation, and are fairly within the scope of the powers conferred upon them by law. *Brown v. Winnisimmet Co.*, 11 Allen, 326.

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Judgment for the plaintiffs.

ATTORNEY-GENERAL v. GREAT EASTERN RAILWAY CO.

IN THE COURT OF APPEAL, MARCH 25, 1879.

[Reported in *Law Reports*, 11 *Chancery Division* 449.]

THIS was an action by the Attorney-General by way of information on the relation of a person representing the body of manufacturers and dealers in locomotive engines and rolling stock, to restrain the Great Eastern Railway Co. from letting for hire any locomotive engines or other rolling stock except for the purposes of the traffic on another railway in extraordinary emergencies, and from manufacturing locomotive engines or other rolling stock

for the purpose of letting the same on hire, or for any other purpose, except for the purpose of being used by the Great Eastern Railway Co. upon a railway worked by them or some part thereof.

The plaintiff moved for judgment upon the admissions in the pleadings.¹

The Great Eastern Railway Co. appealed. The appeal came on to be heard on the 21st of January, 1879.

Chitty, Q. C., and *Smart* for the appellants.

Holker, A. G., and *Macnaghten* for the respondent.

JAMES, L. J., delivered the opinion of the court.²

At the time of the commencement of the transactions which led to this action there were three railway companies—the Eastern Counties, the Blackwall, and the Tilbury.

The Eastern Counties and the Blackwall were much connected together and have since been amalgamated, and by union and growth have become the very great line called the Great Eastern. But while they were distinct lines the Tilbury line was projected. It was so projected and originally constituted in connection with and as an offshoot from them; but some years afterward the Tilbury Co. was incorporated as a distinct corporation. The only access of the Tilbury line to London is by means of what was the Eastern Counties on the one side and the Blackwall on the other, and all its through traffic to and from London is from and to the London stations of what is now the Great Eastern Co.

The Tilbury line appears to have been what is called a contractor's line, and was leased to Messrs. Peto & Co., and while under lease to them was worked by means of the locomotives and rolling stock of the Eastern Counties. In this state of things an act was passed (26 & 27 Vict. c. lxix.), entitled "An Act to authorize arrangements between the Tilbury and Southend Railway Co. and the lessees of their undertaking, and the Eastern Counties and London and Blackwall Railway Companies, with reference to the lease and working of the London, Tilbury, and Southend Railway, and for other purposes." This act recites the history of the Tilbury line up to a certain time, it recites that a lease had been given to Peto & Co., determinable upon giving twelve months' notice to the lessees, and then it recites that by arrangements between the Great Eastern Co. and the lessees the traffic on the London, Tilbury, and Southend Railway was worked by the Great Eastern, and that the Great Eastern and the London and Blackwall Companies, respectively, received

¹ The statement of facts is given in part only. The opinion of Jessel, M. R., denying the motion has been omitted.—Ed.

² So much of the opinions of James and Bramwell, L.JJ., as relates to this question has been omitted.—Ed.

a proportionate part of the tolls in respect of traffic passing over their railway to the Tilbury Railway, and so on, and that the lessees were desirous that powers should be given to effect such arrangements with reference to the lease as were by this act authorized, and that it was expedient that the Tilbury Co. and their lessees and the Great Eastern and the Blackwall Companies, respectively, should be enabled to agree upon such alterations in the terms of the lease, and in the arrangements for working the said railway, and in the apportionment of the receipts and expenses as by this act authorized, and that the Great Eastern and the Blackwall Companies, jointly or severally, should be empowered to take a lease or a transfer of the existing lease of the Tilbury Co. Then there are certain powers enabling those companies to take a lease, there are powers to make arrangements with the lessees and power to transfer to the two companies, and the provisions are to be subject to the approval of the Board of Trade, and then come two clauses, the 14th and the 15th, to which I shall refer more particularly afterward.

The lease to Messrs. Peto expired, and then the Great Eastern continued to supply locomotive power and rolling stock for the working of the Tilbury line, under an agreement which was made by an indenture between the Great Eastern Co. of the one part and the Tilbury Co. of the other part, which after various recitals contains clauses for the working of the traffic, the apportionment of the tolls, and various other purposes; and then it contains special provisions as to running powers and various things which are usual between railway companies, such as the use of the stations, and so on. Then it contains this: "The Great Eastern Co. shall supply the Tilbury Co. with locomotive power at a price fixed per train mile for passengers, goods, etc." And then as to the supply of carriages: The Great Eastern Co. undertook to supply carriages not exceeding sixty in number, at an annual rent, and to keep them in repair, and they agreed also to supply further carriages not exceeding another number of sixty, at a rate to be fixed—so much a day for each carriage. There was a similar clause as to the supply of goods wagons.

This action is brought by the Attorney-General at the instance of certain relators, who may be considered as representing the body of manufacturers of and dealers in locomotive engines and rolling stock, and its object is to have it declared that the Great Eastern Co. is acting *ultra vires* and illegally in carrying on this business of what may be called jobbers of locomotives and carriages. The Master of the Rolls was of opinion that it was illegal, and that it was an illegality which the court ought, at the instance of the Attorney-General, as representing the public, to restrain.

On the argument of the appeal three views of the case were presented by the appellants' counsel: First, that there was nothing, even in the absence of express Parliamentary authority, wrong in what the Great Eastern were doing; second, that there was such Parliamentary authority, if required; third, that the Attorney-General, as representing the public, had no right to call for the intervention of the court, or, to put it in another form, that it was not such a case of sufficient public wrong as to make it the duty of the court to interfere with the company in the conduct of its own business. I have arrived at the conclusion that the appellants are right in each of these contentions.

Upon the first it appears to me that the arrangement which was made with Messrs. Peto in the first instance, and afterward with the Tilbury Co., was a reasonable and proper, and, therefore, legitimate incident of the proper business of the Great Eastern Co. as owners and workers of and carriers on their own line. The traffic on the Tilbury line, from the very nature of things, can only be profitably carried on in connection with that of the Great Eastern. It is manifestly, in my opinion, for the safety and convenience of the public that the same engines, the same carriages, the same staff, should be employed to do all the work, instead of one set doing part and another set doing another part of it. It is obviously for the profit of the two companies that such arrangement should be made, otherwise they would not have made it. There is, as it seems to me, no pretense whatever for saying that this is a sham or a color for enabling the Great Eastern Co. to enter into some distinct business outside the act of Parliament which constitutes the deed of partnership between the shareholders. If it had been a private partnership carrying on the business of working the Great Eastern Railway, it would have been just the arrangement which the managing partner would have entered into. It is not pretended that the Great Eastern have exceeded the capital which they are authorized to raise, nor that they have diverted from their own line and traffic proper any part of that capital required to enable them to fulfil the duties imposed on them or undertaken by them in respect of such line and traffic. They have of course a sufficient margin of engines and rolling stock, or they would not have been able to fulfil their agreement with the Tilbury Co., and if they should at any time find themselves overstrained by that additional demand on their resources in that respect, they can have no difficulty in obtaining from the relators or others on hire a sufficient supply to make good the deficiency. It appears to me that, whether as regards a private partnership, a joint-stock company, or an incorporated company, in the absence of fraud or deliberate perversion, the majority of managing

partners may be trusted, and ought to be trusted, in determining for themselves what they may do, and to what extent they may go in matters indirectly connected with, or arising out of, their business relations with others. It is no part of the business of partners in a great shop to be money lenders, but I should think it very strange if it was held unlawful for one of them to take a bill or check from a customer, handing him the balance over his account in cash. I recollect a case of an attempt being made to restrain an insurance company from paying or contributing to losses which were not technically covered by the terms of their insurances, but it was answered by the court that such liberality was a legitimate mode of preserving and increasing their customers. *Taunton v. Royal Insurance Co.*, 2 H. & M. 135. Where is this notion of *ultra vires* to extend to? Is it *ultra vires* for a railway company to make a profit from the sale of meat and drink at its refreshment rooms? Would it be *ultra vires* for two companies, whose lines are connected, to have joint workshops for the construction or repair of their rolling stock, or joint depots of coals and other stores, or to enter into a joint contract with such persons as the relators for the hire of rolling stock, and to apportion the costs and expenses between themselves according to the respective train miles run on their several lines? Would it be *ultra vires* for one company to let another company have the use of part of its offices, warehouses, and ground?

As regards the second question. Supposing that this agreement should be held to require Parliamentary authority, it appears to me to be plainly authorized. [His Lordship read the 14th section of 26 and 27 Vict. c. lxix.] I am unable to find any implied restriction on the words of this section. It authorizes the Eastern Counties and the Blackwall Companies as between themselves to make arrangements for working the Tilbury line. If as between themselves they are authorized to do it, then it seems to me that they are necessarily authorized as between themselves and the public, and of course as between themselves and the owners of the Tilbury line. The latter did not require any Parliamentary authorization, for of course it is to the latter (and to the public, so far as the public are concerned) wholly immaterial from whom they, the Tilbury Co., hired their power and rolling stock; and it is not denied that, so far as the Tilbury Co. is concerned, they might have made with the relators, or with any other private person, the very bargain they have made with their neighbors, the Great Eastern. But if necessary, there is the express sanction of the 15th section, which enabled the directors of the Southend Co. and the directors of the two companies to enter into any agreement, subject to the sanction of the shareholders, for carry-

ing out all or any of the purposes of this act; and one of the purposes of the act, as it appears to me, was the arrangement which the two companies, the Great Eastern and Blackwall, might make for working the extension railway. It is to be noted that the legislature recognized and impliedly sanctioned the letting to Peto & Co., and if it was not *ultra vires*, or an improper employment of the property of the company, to let to Peto & Co., the lessees, it would be very singular indeed that it should become *ultra vires* and improper to make exactly the same letting to the Tilbury Co., the lessors, on the expiration or determination of the lease. And what was to be done with the working of the traffic? What was to be done with the engines and carriages used for it, if the lease had been suddenly determined by the default of the lessees?

It was suggested in the course of the discussion, that this arrangement might be a device to escape the power of control which Parliament gave to the Board of Trade as regarded leases. It appears to me that that control was given for a very different and very intelligible purpose. An actual lease of the line involves a transfer of the Parliamentary powers and of responsibilities, and there are strong reasons for giving to the Board of Trade power to see that such transfer is made to proper and sufficient persons, persons proper to be entrusted with the Parliamentary powers, and sufficient to answer such responsibilities, and that the lease is not likely to affect the interests of the public by unduly diminishing competition, or diminishing the conveniences for the public, the providing of which was the original consideration for the Parliamentary powers conferred on the company. I can easily conceive the case of a company getting a lease of a parallel or nearly a parallel line, for the very purpose of practically closing it; a thing, of course, to be prevented. It was for some such purposes as that, with a view to some such considerations as I have stated, that I conceive the sanction of the Board of Trade to be required to a lease; but I cannot conceive the Board of Trade's interfering with such a thing as the taking or letting on hire locomotive power and rolling stock. The Board of Trade may be like an elephant's trunk, capable of tearing up a tree or picking up a pin, but I do not conceive that the legislature intended it to be employed in picking up such a very small pin as the agreement before us.

I propose dealing with the third question raised before us, the rather because the Attorney-General pressed us to state our views of it, especially having regard to some decisions on the subject. In my judgment, where the matter is a mere matter of *ultra vires*, that is, whether the managing partners of a concern are or are not doing something outside their charter, act of Parliament, or deed

of settlement, there ought to be some plain and sufficient public mischief shown to warrant a suit on behalf of the Sovereign or the public. It is not, in my opinion, sufficient to say the thing complained of is *ultra vires*, and that it interests the public; that whatever may be the nature or extent of the excess complained of, the excess should be at once stopped, so that bodies incorporated and established by act of Parliament should be taught to keep within their strict lines. I cannot accede to any such view of the duty of the Attorney-General or of this court. Where a company entrusted with large powers is deliberately violating an express enactment, or disregarding an express prohibition of the legislature, it is really committing a misdemeanor, and ought to be at once stopped. In the case of Attorney-General v. Great Western Railway Co., Law Rep. 7 Ch. 767, the railway company was prohibited by law from opening a line before it was passed by an engineer appointed by the Board of Trade, a provision intended for the safety of people's lives, and they were going to disregard that prohibition, and it was no answer for them to say that the line was so safe that no mischief could arise. The company was, of course, restrained from this violation of an express compact with the legislature. Again, in the case of Attorney-General v. Cockermouth Local Board, Law Rep. 18 Eq. 172, the Board were doing works which would or might probably poison a running stream, in direct violation of the law which prohibited them from committing a nuisance. These seem to me good illustrations of the cases in which it is essential for the protection of the public and of individuals that the Attorney-General should interfere.

But take the case of a railway company taking more of a man's land than it ought to take, or doing its works in a manner which he has a right to complain of, the Attorney-General would leave him to protect himself, and certainly would not be heard in this court in a suit at his relation, and certainly much less at the relation of a rival company or carrier. It would be different if what it was doing affected a whole district, which could show an actual *damnum* as well as a theoretical *injuria*. In the case before Vice-Chancellor Kindersley of the Attorney-General v. Great Northern Railway Co., 1 Dr. & Sm. 154, the Vice-Chancellor did proceed on the ground that it was a matter of grave damage and injury to the public. Of course, if such a company as that were allowed to embark in a gigantic coal business, it is easy to see that coal proprietors were not likely to be served on the line as they ought to be served, and there might arise other inconveniences. I am far from saying that a railway company ought to be permitted to carry on the trade of ironmasters, or colliery proprietors, or rolling-stock manufac-

turers, not casually, not incidentally, not collaterally, in the *bona fide* conduct of their own property and business, but as really a distinct and separate trade. I can conceive that such a case might be properly considered by the Attorney-General, and considered by this court, as a fraud on the legislature which had created and authorized the company only for what it professed and undertook to do; but, at all events, it must be something great, something substantial, to warrant such interference. It is not possible to define what is, for this purpose, great, what is substantial, any more than it is possible to define how much of smell or how much of noise amounts to a nuisance, or what is or is not reasonably incident to a business. But, generally speaking, it is not practically difficult to ascertain when the line has been clearly transgressed, and in this case, speaking for myself, I should say that the facts do not show any ground of complaint on the part of the public, even if the agreement had been made out to be theoretically *ultra vires*. And it is, in my judgment, to be considered, for the purposes of this action, that there is no real difference between a body of shareholders incorporated by special act of Parliament for the purpose of making and working a railway, and a body of shareholders incorporated under the general law (now applicable to large associations) for the purpose of establishing and working any other industrial enterprise. So far as the first has compulsory powers it must not abuse them; so far as it has statutory duties it cannot delegate them; so far as it is under any statutory prohibition or direction it must not violate the one or neglect the other. But even in these cases it is only where some public mischief is done, or where, in respect of something intended for the public protection, there is misfeasance or nonfeasance, that the Attorney-General ought to interfere. If a particular landowner has cause of complaint, it is for him to appeal to the tribunals. If as between the company and its shareholders there is a wrongful application of the capital or a wrongful incurring of liabilities, it is for the shareholders to complain; if as between the company and any persons outside the company, it is entering into contracts *ultra vires*, it is for such persons to take proper advice and guard themselves from risks which they are perfectly free to avoid. I cannot myself see any principle on which the Attorney-General is to interfere with a railway company's contracts because they are *ultra vires* any more than he would on the like ground interfere with the contracts of any other incorporated joint-stock company, carrying on any other industrial enterprise. In neither case is it, in my judgment, for the Attorney-General to take up the complaint of a rival trader who says that the company is trading in something which it was not established or incorporated to trade in. I can-

not think that it is for the Attorney-General to invoke the court, nor for the court so invoked, to interfere to prevent a gigantic iron and coal joint-stock company incorporated from opening stores, however vast and however miscellaneous, for the supply of its workmen and neighbors.

On these grounds I am unable to concur in the judgment of the Master of the Rolls, and I give my voice for discharging the order he has made.

BAGGALLAY, L. J. I much regret that I have been unable to arrive at the same conclusions as my colleagues with respect to this appeal, and though the fact of my taking a different view can have no effect as regards the order to be pronounced, I think it right to explain the grounds upon which, in my opinion, the order of the Master of the Rolls ought to be affirmed.¹

Now, having regard to the established general principles to which I have referred, it can hardly be doubted, as a general proposition, that Railway Company A. would be acting in excess of its powers, were it, in the absence of any special powers authorizing it in that behalf, to enter into a contract with Railway Company B. to let to Company B. such locomotive engines or other rolling stock as Company B. might require for the purposes of its traffic. In a greater or less degree, according to the circumstances of any particular case, the supply by Company A. of engines or rolling stock in performance of such a contract must necessitate the providing and keeping in good working order of a greater number of engines, or a larger quantity of rolling stock, whether manufactured by Company A. or otherwise acquired, than would be requisite for the proper working of its own railway; and the maintenance of such a supply of engines and rolling stock would render necessary the employment of a portion of the funds of Company A. It can in no way be said that in the absence of special powers such an employment of its funds would be within the scope of the constitution of Company A.; however profitable the carrying on of such a trade or business might be, it would not be one of the purposes for which the company was incorporated. And if, instead of supplying locomotive engines on hire, Company A. was to bind itself to provide locomotive power—in other words, to provide not only the engines, but also the fuel for their consumption, and the wages of sufficient servants to work them, there would be a necessity for a still larger employment of its funds.

But, admitting the general proposition to be that the entering into any such contract would be in excess of the powers of Company A., the question arises whether it would be applicable to the case of two companies whose railways are continuous, as are those

¹ The opinion is given in part only.—Ed.

of the Great Eastern and Tilbury Companies. In my opinion, the proposition is as applicable to such a case as to one in which the systems of the two companies are quite distinct; the circumstance that the Tilbury Railway is or may be regarded as an extension or continuation of or as a branch from the Great Eastern system, renders it highly desirable that some arrangement should be come to for such a working of the two systems as should avoid the inconveniences to the public, and the consequent loss to the shareholders, which would necessarily arise if they were worked separately; but to effect such a working in no way necessitates the entering into such a contract as that which we are now considering; under similar circumstances the inconvenience and loss arising from separate working are usually avoided by the adoption of one or more of the following schemes: First, by the one company exercising, either by agreement or under statutory authority, running powers over the line of the other; secondly, by the companies availing themselves of the powers conferred on them by the 47th section of the Railways Clauses Consolidation Act, 1845, and arranging for the trains of each company passing over the lines of the other, upon terms arranged between them; or, thirdly, by obtaining statutory powers, under which the line of the one company can be leased to the other, in which case the leased line is worked as if it were part of the general system of the other company. But each and every of these schemes can be efficiently carried out, and as between other companies have been repeatedly carried out, without any letting of locomotive engines or rolling stock, or any contract for the supply of locomotive power by the one company to the other.

Now adequate powers have been obtained for the lease of the Tilbury Railway to the Great Eastern Co., but, for some unexplained reason, it has not been deemed expedient by the two companies to adopt this mode of arranging for the working of their respective railways as component parts of a continuous system. It is also worthy of note that, by the agreement of the 1st of June, 1876, the two companies have made arrangements under which each company has acquired running powers over portions of the railways of the other, and provision is made for through booking over their respective lines. These arrangements are doubtless for the convenience of the public, and will carry their own profit, but they could be quite as efficiently carried out if the Tilbury Co. used their own engines and rolling stock, instead of renting them from the Great Eastern Co., or being supplied by that company with locomotive power.

It has been suggested that that which the Great Eastern Co. has been enjoined from doing might be done by them, or, indeed,

by any railway company under the provisions of the 87th section of the Railways Clauses Consolidation Act, 1845; but the powers conferred by that section are limited to the making of arrangements for the passage of the trains of one company over the railway of another, and for the division or apportionment of the tolls taken on their respective railways—arrangements which are perfectly independent of the sources from which either company obtains its engines and rolling stock or its locomotive power. The competency which we are now considering is not the competency of the Tilbury Co. to hire instead of manufacturing or buying their engines and rolling stock, but the competency of the Great Eastern Co. to manufacture or buy more than they require for working their own railway, and to let the surplus stock for hire to the Tilbury Co.; in other words, to carry on for profit a trade or business other than that which was authorized by their act of incorporation. I can arrive at no other conclusion than that such purposes are *prima facie* foreign to the purposes of a railway company, and in the absence of special powers are *ultra vires*.

BRAMWELL, L. J. The first question in this case is whether (setting aside the statute 26 & 27 Vict. c. lxix.) the defendants have done or are doing or threatening to do something unlawful in the matters complained of. It is said that what they have done, are doing, and threatening to do is unlawful—contrary to law. The reason given is that it is *ultra vires*, that they have no power to do it, and that as they have no power to do it, it is unlawful. To show that they have no power to do it, the acts under which they are created and constituted are referred to, and, certainly, among the things expressed that they may do is not to be found the letting of locomotives on hire. There is no prohibition of doing it, but there is no permission. It is said that because they are not empowered or permitted, they are prohibited; and that they are, therefore, disobeying an act of Parliament, and so breaking the law. This is, undoubtedly, contrary to one's general idea that, unlike some countries where it seems as though nothing is lawful save what is permitted, here in England everything is lawful save what is prohibited. It is opposed to those free trade and *laissez faire* notions which are commonly supposed to have something in them, and under the influence of which some people think that England has thriven considerably. It is said by Mr. Brice that this doctrine or notion was first put into operation in the cases of Attorney-General v. Great Northern Railway Co., 1 Dr. & Sm. 154, and East Anglian Railways Co. v. Eastern Counties Railway Co., 11 C. B. 775. I was counsel for the plaintiff in the latter case. I know none at common law before it in which a trace of this doctrine is to be found, and, certainly, I was never more surprised

than at that decision—a decision that proceeded on grounds which, with all respect be it said, were erroneous, and led, as I believe they have in other cases, to an erroneous result. The mistake was in not distinguishing that many of the provisions of acts of Parliament constituting companies are not provisions as between the companies and the public, but agreements among the shareholders *inter se* which constitute their agreement of partnership, their instrument of settlement. In the case of Attorney-General *v.* Great Northern Railway Co., it was said that where, in the case of injury to private interests, it would be competent for an individual to apply for an injunction to restrain a company from using its powers for purposes not warranted by the acts creating it, it is competent to the Attorney-General, in case of injury to public interests from such a cause, to file an information for an injunction. But, I ask, with sincere respect for the learned judge, what is the similarity of or analogy between the two cases, and what is the injury to public interests in such a case? How is the public injured, or any class of it? When directors of a company do that which is not authorized by their act or charter, or deed of settlement, they break their agreement of partnership. What is there like that when the whole company, directors and shareholders, do something not agreed on in their agreement of partnership? It may be unlawful on other grounds, but the cases are not like, they are wholly different. It is to be noticed that the only case cited by the learned Vice-Chancellor is a case of a complaint by a shareholder. However, these cases were followed by others, and it became the law that acts *ultra vires*, in cases of corporations, were not merely null and void, but were absolutely contrary to law, and illegal. I am not doubting the least that there is a reasonable and well-founded doctrine of *ultra vires*. I refer for a statement of it to what was said by Lord Cairns in *Ashbury Railway Carriage & Iron Co. v. Riche*, Law Rep. 7 H. L. 653, and if I may be permitted to do so, I refer to what I said twenty years ago in *Bateman v. Corporation of Ashton*, 3 H. & N. 323. I have no doubt that a shareholder, not consenting, has a right to object to an act not within the terms of the partnership. I have no doubt, also, that if a thing is prohibited by the statute creating a corporation, the doing of that thing is unlawful, and may be restrained. I have no doubt that, if a corporation is created by royal charter, and the provisions of the charter are disobeyed, the charter is jeopardized. I have no doubt that, if a railway company is prohibited from opening their railway with a single line, it may be restrained from doing so; that the pollution of a river, forbidden by law, may be restrained, and that other acts contrary to law, or contrary to a duty to or right of the public, may be restrained or

punished. My doubt is where there is no prohibition, and the act is not contrary to any duty toward or in violation of any right of the public, whether it can be the law that if six partners carried on the trade of hatters, they might agree to deal in boots; but that if seven associate themselves in a registered company, as hatters, their dealing in boots is not only *ultra vires*, but unlawful—an offense possibly punishable. I admit it is *ultra vires*; that is decided in *Ashbury Railway Carriage & Iron Co. v. Riche*, Law Rep. 7 H. L. 653. The public is entitled to hold a registered company to its registered business.

There is a noticeable thing in this *ultra vires* doctrine. It is recognized and acted on in courts of common law, as nullifying *ultra vires* contracts, but it is apparently always enforced against offenders in courts of equity only. But if acting *ultra vires* is unlawful, surely there must have been a remedy for or power of preventing it at law before the Judicature Act. I mean a remedy at the instance of the Crown. No doubt a mandamus would lie to enforce the performance of a duty in a corporation to do a thing ordered by statute or charter; but is there any case of a mandamus not to do a thing, not to let, for instance, carriages on hire? No doubt, also in some cases, a criminal information would lie where an illegal act was done. But is it supposable that one would lie here? If it would, so would an indictment, as the act is illegal. Then it is said that a *quo warranto* may be maintained. So it may in some cases, but what usurpation of a franchise is there here? I cannot but entertain great doubt if there is any way of reaching this matter at common law, and consequently great doubt if there ought to be any in equity. *Attorney-General v. Utica Insurance Co.* and *Attorney-General v. Tudor Ice Co.*, cited in *Brice on Ultra Vires*, 2d ed., p. 905. However, the law has been so laid down that I think we ought to be governed by it, whatever doubts I may have of its original validity, and that the only utility in discussing its origin is to try and find out its principle and extent, and see if any particular case is within it. Now, what have these defendants done here? They are not letters on hire of locomotives and rolling stock. They do not carry on, nor profess to carry on, such a trade or business. What has been done is this: The appellants are owners of, and work a very large extent of, line (1300 miles). I believe they have a vast number—many hundreds—of locomotives. The Tilbury Co. are owners of a small line, having access to London, to which their traffic mainly goes, only over the lines of the appellants. They have not and never had any locomotives. Their line has been worked by lessees from its opening down to the year 1875, and since then it has worked its traffic in the following manner: The

appellants furnish to the Tilbury Co. locomotive power and rolling stock sufficient for the Tilbury Co. to work their traffic. The agreement as to the locomotive power is that sufficient engine drivers, stokers, coals, and all necessities save water, for working the locomotives, shall be furnished by the appellants to the Tilbury Co.; that during their use by the Tilbury Co. the men shall be servants of the company; that the remuneration to the appellants for what is called the hire of the rolling stock shall be at a certain rate. This agreement has been acted on, and was so at the time of the commencement of this action, and has been so since. That it is for the benefit of the two companies, or was when they made it, is certain. We ought to be satisfied of that from their having come to it. Probably, also, the working of the Tilbury line by the men employed by the Great Eastern Co., who are familiar with the approaches to London, is beneficial to the public. There can be no doubt that the appellants are deeply interested in the Tilbury traffic. Anyhow, the arrangement was come to by the companies for their supposed benefit, not for profit as letters to hire, and no pretense of injury or wrong to the public or any individual is suggested. Of course we have heard about great companies getting a monopoly, but as the Attorney-General admitted, if they get it in such a case as this it is because they can undersell everybody else, which, as he said, is not a thing for the public to mourn over. But the pretense is idle. Individual energy and competition will keep the private trader in possession of part of such a trade as that here in question. However, some locomotive makers, with a view to their personal gains, complain, and under their auspices the case comes before us. Whether the Attorney-General has any discretion to refuse the use of his name, I know not. If he has, and has decided to let it be used, I am most certain that he has not done so without due consideration, or from any other motive than as sense of duty. Nobody has suggested that there is any question of public policy involved in the present case, unless the danger of monopoly. However, there are the decisions, and they must be obeyed, whatever we may think of the motives of the relators, which seem of the same character as objections to machinery, or to doing more than a certain quantity of work in a certain time, or any other mischievous objection to liberty of action, which we blame so heartily in trades unions, and which these relators would be loud in condemning in their workmen. But the decisions have not gone to the extent of saying that nothing can be done but what is expressly mentioned in the act incorporating the company. There may be a ferry-boat to aid railway traffic, book stalls may be let, refreshment rooms kept, and other things done which may be called ancillary or subordinate to

the main purpose of the railway company, or arising out of or consequent on its existence. I hold that this letting on hire is such a case. Suppose on an emergency rolling stock was wanted, might it be let for a day? If so, for a week, or month, or year? Suppose it was found that there was an excess of stock which could profitably be let. Is it to remain idle that these relators may have the chance to make a few more? Take the case of a gas company, and suppose it could work up the coke when hot more profitably than it could if cold, may it not be done? Must they sell their coke cold to others who must heat it? Here the Tilbury Co. had no rolling stock. Unless they hired of some one, their line must remain unworked, to the public injury and loss of toll to the defendants. Of no one could the Tilbury Co. hire so cheaply as of the defendants. I am of opinion, then, that this arrangement is not *ultra vires*, even without the particular statute which I proceed to examine.

I am also of opinion that this arrangement is allowed by that statute, 26 & 27 Vict. c. lxix.

I am of opinion that the judgment of the Master of the Rolls should be reversed.

Action dismissed with costs.

THE LONDON AND NORTHWESTERN RAILWAY
CO. AND OTHERS v. PRICE & SON.

IN THE QUEEN'S BENCH DIVISION, JUNE 13, 1883.

[*Reported in Law Reports, 11 Queen's Bench Division 485.*]

SPECIAL case stated in an action in the county court of Shropshire holden at Shrewsbury.

The case stated the following material facts:

The action was brought to recover a sum of £1 11s. 2d., in respect of charges made by the plaintiffs for weighing coal for the defendants.

The defendants were coal merchants carrying on business at Minsterley Station, which is on a branch line of the Shrewsbury and Welchpool Railway. The railway and branch line were constructed under powers given by a local act (19 & 20 Vict. c. cxxxii.), and were subsequently transferred to and became the property of the plaintiffs under the provisions of the local acts, 27 & 28 Vict. c. cxcvi., and 28 & 29 Vict. c. ccxcix.

The defendants for the purposes of their business occupied, as tenants to the plaintiffs, a wharf in the yard of the station adjoining a siding of the railway, and they paid to the plaintiffs a rent of 1s. per square yard per annum for the land so occupied. All the coal supplied to the defendants for their business at Minsterley Station was conveyed thither by the plaintiffs upon their railway and delivered to the defendants at the wharf, and therefrom sold and delivered by the defendants to their customers.

The plaintiffs had a weighing-machine suitable for weighing coals fixed in the yard of the station, and used by them from time to time for their own purposes. The defendants, on receiving consignments of coal at the station, generally had occasion to weigh the coal before delivering the same to purchasers. There was no other machine than that belonging to the plaintiffs suitable for weighing coal at or near the station. For some years previously to April, 1882, the defendants, and other wharfholders at Minsterley Station, had used the plaintiff's weighing-machine without charge; but in February, 1882, the plaintiffs put up a printed notice in the station addressed "to the public," and stating that on and after the 1st of April, 1882, the sum of 1d. per ton, or part of a ton, would be charged by them for the weighing of all coal over their machines, whether the persons for whom the weighing was done were wharfholders or not. The defendants had knowledge of this notice.

The defendants continued to weigh coal on the plaintiffs' machine during the months of April and May, 1882, and paid the plaintiffs' charges, in respect of coal so weighed, according to the notice. The defendants subsequently to May, 1882, weighed coal on the machine, but refused to pay any charge therefor, and it was agreed that, if the action was maintainable, the sum of £1 2s. was due from the defendants to the plaintiffs in respect thereof.

At the hearing in the county court the defendants contended that the charges made and claimed by the plaintiffs did not come within their tariff of charges, and were made without any statutory authority.

The judge nonsuited the plaintiffs, holding that the services and charges in respect of which the claim was made were *ultra vires* of the plaintiffs' statutory authority.

The question for the opinion of the court was whether or not the charges were *ultra vires* of the plaintiffs' statutory authority.

Wightman Wood, with him *J. V. Austin*, for the plaintiffs.

Kenelm Digby for the defendants.

WATKIN WILLIAMS, J. I am clearly of opinion that the nonsuit in this case was wrong, and that the judgment of the county

court judge must be reversed. It is only necessary to state the facts to show that the case is absolutely clear in favor of the plaintiffs. [His Lordship stated them.] It is to my mind an astonishing proposition that the defendants, having used the plaintiffs' weighing machine, and having agreed to pay for the use of it—for that is the effect of the facts stated in the case—should now be entitled to say that the contract was *ultra vires* and void, and so could not be the foundation of any action at law. No doubt if the contract was *ultra vires*, no effect whatever can be given to it; the court cannot travel beyond the legal result of the parties' acts. But I am of opinion that the contract was not *ultra vires*. The observations of Lord Justice James in *Attorney-General v. Great Eastern Ry. Co.*, 11 Ch. D. p. 480, are applicable to this case. He asks, "Where is this notion of *ultra vires* to stop?" and states various instances in which it would be absurd to say that the doctrine applied. I think that his observations cover this case, and I am of opinion that the plaintiffs, who possessed the weighing-machine for the purposes of their railway, and as incidental to their business as carriers, had a perfect right to allow not only the persons for whom they carried coals, but also the public at large, to have the occasional use and convenience of the machine, and were entitled to make a fair charge for the use of it. I cannot distinguish this case from the cases of refreshment rooms and other conveniences in stations, not strictly connected with the business of a railway company, but established for the advantage of those with whom they come in contact in the course of their business.

SMITH, J. I am also of opinion that the plaintiffs were entitled to succeed, and I rest my decision solely on the facts of this case. The plaintiffs carried coals for the defendants, and at the termination of the carriage the plaintiffs warehoused the coals, which were in bulk and supplied in large quantities. The defendants request the plaintiffs to weigh the coal for them on the plaintiffs' machine, knowing perfectly well that a charge of 1*d.* per ton will be made for the use of the machine. The coal is weighed, and in answer to an action for the weighing charges, the defendants set up that the whole transaction was *ultra vires* on the part of the company, who are therefore not entitled to recover.

The argument of the defendants' counsel convinced me that the charge was not expressly authorized by any of the acts of Parliament relied on by the plaintiffs' counsel. The question arises—assuming that the charge is not within the direct terms of those acts—whether or not this action can be maintained on the ground that the service is incidental and convenient to the exercise of the plaintiffs' powers as carriers of goods for the defendants. It

seems to me most convenient that the company should do what they have done. It was argued that the notice informing persons of the charge to be made was invalid. I give no opinion upon that. I think the notice formed no part of the contract. If it had been necessary to put the notice in at the trial, could it have been suggested that it must be stamped as being the contract between the parties? The plaintiffs are entitled to say to the defendants, "At your request we weighed the coal, and you knew the charge, which was a reasonable one, because you knew of the notice." I am of opinion that this case comes clearly within the principle of the decision in *Attorney-General v. Great Eastern Ry. Co.*, 5 App. Cas. 473. In that case the Lord Chancellor, agreeing with the judgment of Lord Justice James, in *Ashbury Ry. Carriage Co. v. Riche*, Law Rep. 7 H. L. 653, said that this doctrine of *ultra vires* ought to be reasonably, and not unreasonably, understood and applied, and that whatever might fairly be regarded as incidental to, or consequent upon, those things which the legislature had authorized, ought not (unless expressly prohibited) to be held by judicial construction to be *ultra vires*. It is manifest that in the present case the charge made is not expressly prohibited. I am of opinion that it was made for work done and services rendered, which were incidental to, and consequent upon, those things which the legislature had authorized; and therefore in my judgment the action is maintainable.

Judgment for the plaintiffs.

SECTION II.—POWER TO MAKE SIMPLE CONTRACTS.

THE BANK OF COLUMBIA v. PATTERSON'S ADMINISTRATOR.

IN THE SUPREME COURT OF THE UNITED STATES, FEBRUARY 5, 1813.

[Reported in 7 Cranch 299.]

ERROR to the Circuit Court for the District of Columbia, in an action of *indebitatus assumpsit*, brought by the defendant in error against the president, directors, and company of the Bank of Columbia, in their corporate capacity. There were four counts only in the declaration.

1. *Indebitatus assumpsit*, for matters properly chargeable in ac-

count. 2. *Indebitatus assumpsit*, for work and labor done.
 3. *Quantum meruit*. 4. *Insimul computassent*.

The defendant pleaded non-assumpsit and a tender.

On the trial below the defendant took three bills of exceptions.

The first stated that the plaintiff read in evidence a sealed agreement, dated December 10, 1807, between Patterson and a duly authorized committee of the directors of the bank, under their private seals. It recites that a difference of opinion had arisen between Patterson and the committee for building the new banking-house, as to certain work extra of an agreement made between Patterson and the said committee in 1804, and thereto annexed; whereupon it was agreed that all the work done by Patterson should be measured and valued by two persons therein mentioned, according to certain rates, called in Georgetown old prices, and the sum certified by them should be taken by both parties, in their settlement, as the amount thereof. It was also thereby agreed that the outhouses, respecting which there had been no specific agreement, should be measured and valued by the same persons in the same manner. The agreement of 1804 referred to in and annexed to the agreement of 1807, was also offered in evidence by the plaintiff, and states that Patterson had agreed with the committee to do all the carpenter's work required, agreeably to the plan of the new bank, and states particularly the manner in which it was to be done; and that "in consideration of the work being done" as stated, the committee agreed to pay Patterson \$3625 as full consideration; and that if, when the work should be finished, the committee should be of opinion that that sum was too much, Patterson agreed to have the work measured, at the expense of the bank, by two persons mutually appointed, who should take the old prices as the standard, and in case the bill of measurement did not amount to the sum of \$3625, Patterson agreed to take the amount of measurement for full satisfaction. The plaintiff then read in evidence a paper of particulars of the work, certified by the persons named in the agreement of 1807. The defendants offered in evidence the plan of the building, and that it was built principally according to that plan and the agreement—and that any work other than that stated in the plan and agreement was to be charged separately as extra work, and that it was so charged by Patterson, before the 10th of December, 1807, the date of the second agreement, who presented the account (so charged) to the defendants, claiming the amount of the same, and claiming also for the work done under the agreement of 1804, the sum of \$3625, and proved that while the work was going on the defendants paid Patterson sundry large sums of money on account thereof.

The court was thereupon prayed by the defendants to instruct

the jury, that if they believed that the agreement of 1804 was assented to by Patterson and the committee as binding between them, and that the work therein contracted for was done by Patterson, and that the sum of \$3625 therein mentioned was claimed by him on account of the same, then the plaintiff could recover for no such work, but could only recover for the work done extra of the said agreement; which instruction the court refused to give.

It was contended by the defendant's counsel, *Morsel & Key*, that in that refusal the court below erred.

Jones and C. Lee contra.

STORY, J., delivered the opinion of the court as follows:

Several exceptions have been taken to the opinion of the court below, which will be considered in the order in which the objections arising out of them have been presented to us. We are sorry to say that the practice of filing numerous bills of exceptions is very inconvenient; for all the points of law might be brought before the court in a single bill with a simplicity which would relieve the bar and the bench from every unnecessary embarrassment.

3. Another objection is that as the agreement of 1807 is sealed, and is connected, by reference, with the prior agreement, they are to be construed as one sealed instrument, and assumpsit will not lie upon an instrument under seal.¹

The foundation of this objection utterly fails, for the agreement is not under the seal of the corporation, but the seals of the committee; and if it were otherwise, it is too plain for argument that the original agreement was not extinguished, but referred to as a subsisting agreement. It is quite impossible to contend that the mere recital of a prior, in a later agreement, after it has been executed, extinguishes the former.

Two other objections are made under this exception; but as they are answered in the preceding observations, it is unnecessary to notice them farther.

Under the third exception, the only objections relied on are in principle the same as the objections urged under the former exceptions and they admit the same answers.

The case has thus been considered all along as though the contracts were made between the plaintiff's administrator and the corporation, and indeed some points in the argument have proceeded upon this ground. / It is very clear, however, that neither the first nor second agreements were made by the corporation, but by the committee in their own names/ In consideration of the work being done, the committee, and not the corporation, personally and expressly agree to pay the stipulated price. A ques-

¹ Only so much of the opinion is given as relates to this objection.—Ed.

tion has therefore occurred how far the corporation were capable of contracting, except under their corporate seal; and if it were capable, as no special agreement is found in the case, how far the facts proved show an express or an implied contract on the part of the corporation.

Anciently it seems to have been held that corporations could not do anything without deed. 13 H. 8, 12; 4 H. 7, 6; 7 H. 7, 9.

Afterward the rule seems to have been relaxed, and they were, for conveniency's sake, permitted to act in ordinary matters without deed; as to retain a servant, cook, or butler. Plow. 91*b*; 2 Sand. 305, and gradually this relaxation widened to embrace other objects. Bro. Corp. 51; 3 Salk. 191; 3 Lev. 107; Moore 512. At length it seems to have been established that though they could not contract directly, except under their corporate seal, yet they might by mere vote or other corporate act, not under their corporate seal, appoint an agent whose acts and contracts, within the scope of his authority, would be binding on the corporation. *Rex v. Bigg*, 3 P. Wms. 419; and courts of equity, in this respect seeming to follow the law, have decreed a specific performance of an agreement made by a major part of a corporation, and entered in the corporation books, although not under the corporate seal. 1 Fonb. 305, Phil. ed. note (o.). The sole ground upon which such an agreement can be enforced must be the capacity of the corporation to make an unsealed contract.

As it is conceded in the present case that the committee were fully authorized to make agreements, there could then be no doubt that a contract made by them in the name of the corporation, and not in their own names, would have been binding on the corporation. As, however, the committee did not so contract, if the principles of law on this subject stopped here, there would be no remedy for the plaintiff except against the committee.

The technical doctrine that a corporation could not contract except under its seal, or, in other words, could not make a promise, if it ever had been fully settled, must have been productive of great mischiefs. Indeed, as soon as the doctrine was established that its regularly appointed agent could contract in their name without seal, it was impossible to support it; for otherwise the party who trusted such contract would be without remedy against the corporation. Accordingly it would seem to be a sound rule of law that wherever a corporation is acting within the scope of the legitimate purposes of its institution, all parol contracts made by its authorized agents are express promises of the corporation; and all duties imposed on them by law, and all benefits conferred at their request, raise implied promises, for the enforcement of which an action may well lie. And it seems to the court that ad-

judged cases fully support the position. *Bank of England v. Moffat*, 3 Bro. Ch. Rep. 262; *Rex v. Bank of England*, Doug. 524, and note *ibidem*; *Gray v. Portland Bank*, 3 Mass. Rep. 364; *Worcester Turnpike Corporation v. Willard*, 5 Mass. Rep. 80; *Gilmore v. Pope*, 5 Mass. Rep. 491; *Andover & Medford Turnpike Corporation v. Gould*, 6 Mass. Rep. 40.

In the case before the court these principles assume a peculiar importance. The act incorporating the Bank of Columbia (act of Maryland, 1793, c. 30) contains no express provision authorizing the corporation to make contracts. And it follows that upon principles of the common law, it might contract under its corporate seal. No power is directly given to issue notes not under seal. The corporation is made capable to have, purchase, receive, enjoy, and retain lands, tenements, hereditaments, goods, chattels, and effects, of what kind, nature, or quality soever, and the same to sell, grant, demise, alien, or dispose of—and the board of directors are authorized to determine the manner of doing business, and the rules and forms to be pursued; to appoint and pay the various officers, and dispose of the money or credit of the bank, in the common course of banking, for the interest and benefit of the proprietors. Unless, therefore, a corporation, not expressly authorized, may make a promise, it might be a serious question how far the bank-notes of this bank were legally binding upon the corporation, and how far a depositor in the bank could possess a legal remedy for his property confided to the good faith of the corporation. In respect to insurance companies also it would be a difficult question to decide whether the law would enable a party to recover back a premium the consideration of which had totally failed. Public policy therefore, as well as law, in the judgment of the court, fully justifies the doctrine which we have endeavored to establish. Indeed, the opposite doctrine, if it were yielded to, is so purely technical that it could answer no salutary purpose, and would almost universally contravene the public convenience. Where authorities do not irresistibly require an acquiescence in such technical niceties, the court feel no disposition to extend their influence.

Let us now consider what is the evidence in this case, from which the jury might legally infer an express or an implied promise of the corporation. The contracts were for the exclusive use and benefit of the corporation, and made by their agents for purposes authorized by their charter. The corporation proceed, on the faith of those contracts, to pay money from time to time to the plaintiff's intestate. Although, then, an action might have laid against the committee personally, upon their express contract, yet as the whole benefit resulted to the corporation, it seems

to the court that from this evidence the jury might legally infer that the corporation had adopted the contracts of the committee, and had voted to pay the whole sum which should become due under the contracts, and that the plaintiff's intestate had accepted their engagement. As to the extra work, respecting which there was no specific agreement, the evidence was yet more strong to bind the corporation.

In every way of considering the case it appears to the court that there was no error in the court below, and that the judgment ought to be affirmed.

— *Serg. Law.*

EAST LONDON WATER WORKS CO *v.* BAILEY AND
OTHERS.

IN THE COMMON PLEAS, JUNE 26, 1827.

[Reported in 4 Bingham 283.]

THE plaintiffs, a corporate body, sued the defendants in assumpsit, on a contract entered into February 25, 1824, for the delivery of a certain number of iron pipes at stated periods, pursuant to certain proposals issued by the plaintiffs and accepted by the defendants. The pipes were to be made according to a specification, containing minute details as to size, shape, and quality; were to be marked in various parts with the letters E. L., and were to be delivered, certain portions in April, May, June, July, and August, 1824, and the residue by Lady Day, 1825. The defendants did not deliver the whole quantity contracted for, and this action was brought to recover damages for their failure to do so. The contract was not under seal.¹

At the trial before BEST, Ch. J., London sittings, after Hilary term, many objections, both in fact and law, were raised against the plaintiffs' claim, and among the rest, that the plaintiffs, being a corporate body, could not enter into a contract except under seal, and consequently could not sue in assumpsit; whereupon a verdict was taken for the plaintiffs, with leave for the defendant to move to set it aside and enter a non-suit, upon this and other grounds.

Wilde, Serjt., moved for a rule *nisi* accordingly.

Taddy, Serjt., *contra*.

BEST, Ch. J. This was an action of assumpsit to recover damages for the non-delivery of certain iron pipes according to agreement. Several objections were made to the plaintiffs' claim at the trial, and were reserved for the consideration of the court. It

¹ A portion of the statement of facts has been omitted.—Ed.

is only necessary, however, for us to notice one of them, as that is fatal to the claim—namely, that this is an action of assumpsit against a corporation on an executory contract. If the plaintiffs were not bound by this contract, neither were the defendants, as no contract which is not mutual can be valid. I had no difficulty on this point at the trial, but a doubt having been raised on the construction of the act constituting the corporation, it was reserved for the consideration of the court. It is clear as a general rule that a corporation cannot express its will except by writing under the common seal of the body corporate. It has indeed been contended at the bar that this rule is confined to contracts affecting real property; but the rule is by no means so confined, although undoubtedly it is subject to some exceptions: these are to be found in Bro. Abr., tit. Corporation, pl. 56, and the present case does not fall within any of them.

The first is, where the contract is executed; in that case the law implies a promise, and a deed under seal is not necessary, as we have lately decided in the Mayor and Corporation of Stafford *v.* Till, where it was held that a corporation might maintain assumpsit for the use and occupation of their land.

The next exception is, where the acts done are of daily necessity to the corporation, or too insignificant to be worth the trouble of affixing the common seal: all these are enumerated in Bro. Abr., Corporation, 56, and in Horn *v.* Ivy.

Another exception is, where a corporation has a head, as a mayor, or a dean, who may give commands which a party may obey without the sanction of a common seal (Randel *v.* Deane, 2 Lut. 1497), or may bind the corporation by record (Vin. Abr., Corporation, K. 7, 21). A fourth exception is, where the acts to be done must be done immediately, and it would be impossible to wait for the formality of the corporation seal; as where cattle are to be distrained damage *feasant*, which might escape before the seal could be affixed. Manby *v.* Long, 3 Lev. 107. But it is only in cases of necessity, occasioned by the hurry of the proceeding, that such a course can be pursued; for in Horn *v.* Ivy it is laid down that the appointment of the bailiff who is to make distresses for the corporation must be under seal.

The same principle of necessity applies to corporations created for purposes of trade, such as the Bank of England. The very object of that institution requires that it should have the power of issuing bills of exchange and promissory notes. But this indulgence is not extended beyond cases of necessity; for in Slark *v.* The Highgate Archway Co. the court said: "The assumpsit on notes would not lie against a corporation, unless the act which authorized the making of the promissory notes *eo nomine*, by the

corporation *ex vi termini*, impliedly empowered the corporation to make a promise." And in *Broughton v. The Manchester Water Works Co.*, which I should not cite but that my judgment in the case has been confirmed by a decision in this court, I am reported, and correctly, to have said: "When a company, like the Bank of England or East India Co., are incorporated for the purposes of trade, it seems to result from the very object of their being so incorporated that they should have power to accept bills or issue promissory notes. It would be impossible for either of these companies to go on without accepting bills."// This, therefore, being an action of assumpsit on an express executory contract where the party cannot recover on any legal implication, but only on the bargain as it actually exists, is an action which does not lie against a corporation, unless authorized by the act which constitutes the corporation. The contract not being binding on the corporation, there is no mutuality between the parties, and as the corporation cannot be sued, neither can it sue. Does the statute, then, contain anything to alter, in this instance, the general law by which corporations are bound? The act creating this corporation (47 G. 3, c. 72, § 28) enacts "That the directors may make contracts, agreements, and bargains with the workmen, agents, undertakers, and other persons employed in the said undertaking." This seems, at first sight, to give the directors authority to make a bargain such as the present; but in truth it is only intended to enable them to regulate the internal concerns of the company without the incumbrance of calling all the members of the company together. The directors may, indeed, of their own authority, make a bargain under the provisions of this clause in the act; but they must make such bargain in the usual way; the company must express their assent in the mode prescribed by law, by a writing under their common seal. //

Upon the ground, therefore, that in this instance the plaintiffs have sued on a contract, not under the common seal of the corporation, the rule for setting aside the verdict which has been obtained by them must be made absolute.

SECTION III.—POWER TO CONTRACT DEBTS AND ISSUE NEGOTIABLE PAPER.

FRANKLIN CO v. LEWISTON INSTITUTION FOR SAVINGS.

IN THE SUPREME JUDICIAL COURT OF MAINE, DECEMBER 18, 1877.

[Reported in 68 Maine Reports 43.]

W. P. Frye, J. B. Cotton, and W. H. White, with whom was *N. Webb*, for the plaintiffs.

N. Morrill for the defendants.

WALTON, J.¹ The claim which we are required to pass upon originated in this way.

In April, 1875, the trustees of the Lewiston Institution for Savings subscribed for \$50,000 worth of the capital stock of the Continental Mills, one of the manufacturing corporations doing business at Lewiston. The savings bank had no money with which to pay for the stock, and in July following the Franklin Co., another corporation doing business at Lewiston, agreed to pay the \$50,000 to the Continental Mills, take the notes of the savings bank for the amount, and hold the stock as security. Five notes for \$10,000 each, payable in one year from date, with interest semi-annually, were prepared and signed by the treasurer of the savings bank, and sent to William B. Wood, at Boston; and he, being treasurer of the Continental Mills as well as treasurer of the Franklin Co., paid the money in his latter capacity to himself in his former capacity, and afterward (when does not appear) made a certificate, signed by himself and the president of the Continental Mills corporation, stating that the Franklin Co. was the "proprietor of five hundred shares in the Continental Mills, as collateral." It does not appear that this certificate was ever delivered to the savings bank, or offered to them, or that any of its officers ever knew of its existence. And it does not show upon its face that the savings bank has any interest in the stock, or connection with it whatever. The Lewiston Institution for Savings having become insolvent, in May, 1876, commissioners were appointed to receive and decide upon all claims against the institution. The Franklin Co. presented for allowance the five notes above described, and afterward filed a claim for \$50,000 and interest, as so much money paid out by the Franklin Co. at the request and for the benefit of the savings institution. Both claims

¹ So much of the opinion as relates to the right of a corporation to buy the stock of another corporation should be considered in connection with the cases *infra*, pp. —ED.

were rejected by the commissioners, and the case is before the law court on report agreed to by counsel. There is no other consideration for the notes, and no other basis for the claim for money paid, than the payment to the Continental Mills above described. The claims, therefore, are one in substance, although presented in two forms.

1. The first question is whether it is competent for the trustees of a savings bank, at a time when there are no funds in the bank for investment, to agree to take shares in a manufacturing corporation, and thereby create a debt binding upon the bank.

We think not. It is familiar law that a corporation possesses such powers, and such only, as the law of its creation confers upon it. The rule is stated with great uniformity.

"A corporation has only such powers as are specifically granted, or such as are necessary for carrying the former into effect; and these powers can only be exercised for the purposes contemplated by its charter." Brightley's Federal Digest, citing *Humphreville Copper Co. v. Sterling*, 1 West. L. Mo. 126; *Beaty v. Knowler*, 4 Pet. 152; S. C. 1 McL. 41; *Perrine v. Chesapeake & Del. Canal Co.*, 9 How. 172; *Farnum v. Blackstone Canal Co.*, 1 Sum. 46.

"A corporation can do no acts, and make no contracts, either within or without the State which created it, except such as are authorized by its charter." Br. Fed. Dig., citing *Bank of Augusta v. Earle*, 13 Pet. 519; *Tombigbee R. R. Co. v. Kneeland*, 4 How. 16; *Runyan v. Coster's Lessee*, 14 Pet. 122.

"A corporation, being the mere creature of law, possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence." Marshall, Ch. J., in *Dartmouth College v. Woodward*, 4 Wheat. 518, 636.

"An incidental power is one that is directly and immediately appropriate to the execution of the specific power granted, and not one that has a slight or remote relation to it." *Hood v. N. Y. & N. H. R. R.*, 22 Conn. 1, 502.

As corporations are created by public acts of the legislature, and all their powers, duties, and obligations are declared and clearly defined by public law, parties dealing with them must take notice of those powers and the limitations upon them, at their peril; and will not be allowed to plead ignorance of those powers and limitations in avoidance of the defense of *ultra vires*. *Pearce v. Mad. & Ind. R. R.*, 21 How. 441; *Andrews v. Ins. Co.*, 37 Maine, 256.

"In the United States corporations cannot purchase, or hold, or deal in the stocks of other corporations, unless expressly authorized to do so by law." Green's Brice's *Ultra Vires*, 95, note, citing a large number of authorities.

"It certainly needs no argument or authority to show that a corporation created for the purpose of insurance has no power to advance its moneys or obligations to sustain another corporation in a similar or dissimilar business." Opinion of the court in *Berry, receiver, v. Yates*, 24 Barb. 199.

"When the directors of the company subscribe for stock in a building corporation, whatever may have been their motive, they transcended the powers conferred upon them, and departed from the legitimate business of the company, as much as if they had subscribed for stock in a manufacturing or steamboat company; and such subscription, in our opinion, is not binding upon the defendants, and any payments made upon it to the plaintiffs would be money received without consideration." Opinion of the court in *Mutual Savings Bank v. Meriden Agency Co.*, 24 Conn. 159.

If a corporation can purchase any portion of the capital stock of another corporation it can purchase the whole, and invest all its funds in that way, and thus be enabled to engage exclusively in a business entirely foreign to the purposes for which it was created. A banking corporation could become a manufacturing corporation, and a manufacturing corporation could become a banking corporation. This the law will not allow; and it has been held that notes given by a manufacturing corporation for the purchase of shares in a bank are not collectible. *Sumner v. Marey*, 3 W. & M. 105. That the notes given by a railroad corporation, for the purchase of a steamboat to be run in connection with its road, are not collectible. *Pearce v. Railroad*, 21 How. 441.

It would seem, therefore, upon principle as well as authority, that it is not within the authority of the trustees of a savings bank to invest its funds in the stock of manufacturing corporations, unless expressly authorized so to do by its charter, or the public laws of the State.

But we do not rest our decision upon this ground. We rest it upon the broader ground that it is not competent for the trustees of a savings bank to purchase on credit property of any kind, not needed for immediate use, or the investment of ^{money} existing funds. ^{should not be} No such power is expressly conferred upon them; nor do we think ^{it} ^{can} it can be sustained as an incidental power. ^{do} ^{used}

It is suggested that it may be convenient in this way to provide, in advance, for the investment of funds that may afterward come into the possession of the bank. We think the creation of debts by corporations or individuals, for no other purpose than to provide a ready way to dispose of future acquisitions, a proceeding of very questionable convenience; that in the great majority of cases it would be likely to prove, as it did in this case, very inconvenient. But it is a sufficient answer to say that the

law imposes no duty upon the trustees of savings banks to provide for the investment of future funds or future deposits. Their whole duty is performed when they have provided safe investments for the funds already committed to their care. To hold that they may create debts binding upon existing depositors for the benefit of future depositors, whose money, after all, may never be committed to their care, would be a doctrine as startling as it would be unprecedented.

3. Another ground on which the Franklin Co. claims to recover is that, when a contract has been executed, in whole or in part, and the corporation has thereby received a benefit, a recovery may be had by the other contracting party to the extent of the benefit thus conferred, notwithstanding the contract was *ultra vires*.¹ It is a sufficient answer to this argument to say that the case fails to show that the savings bank has been thus benefited. The \$50,000 paid by the Franklin Co. was paid directly to the Continental Mills. Not a cent of it ever came into the possession of the savings bank. The stock for which the \$50,000 was paid was issued directly to the Franklin Co. The title never for a moment vested in the savings bank. Although, by the terms of the agreement, the Franklin Co. was to hold the stock as collateral security merely, still, the agreement being *ultra vires*, cannot be enforced. Nothing possessing the slightest intrinsic value, not even a right of action, was ever secured to or vested in the savings bank. There is absolutely nothing on which a *quantum meruit* or a *quantum valebat* claim can be sustained.²

Decision of the commissioners affirmed.

Claim of the Franklin Co. disallowed.

APPLETON, Ch. J.; BARROWS, VIRGIN, PETERS, and LIBBEY, JJ., concurred.

FRED A. BRADBURY v. BOSTON CANOE CLUB.

IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS, JANUARY
10, 1891.

[Reported in 153 *Massachusetts Reports* 77.]

C. J. McIntire and F. Hunt for the plaintiff.

C. H. Sprague for the defendant.

HOLMES, J. This is an action upon a promissory note for one

¹ So much of the opinion as relates to this question should be considered in connection with the cases *infra*, pp. —Ed.

² A portion of the opinion relating to the question of illegality has been omitted.—Ed.

hundred and fifty dollars and interest, given by the defendant to the plaintiff for money lent to it by the plaintiff to be used in building a club-house. There is a second count for money lent. At a meeting, duly called, the corporation passed a vote authorizing its treasurer to borrow money in terms sufficiently broad to cover the loan in question. The suggestion that no sufficient notice of the business to be transacted was given, does not seem to us fairly open on the agreed facts. Moreover, it would be impossible to argue that the defendant had not recognized and ratified the act of its treasurer in borrowing from the plaintiff. The money was received by the corporation, and was used by it for the purpose mentioned. The only question for us is, whether the corporation acted illegally in borrowing money for the purpose of erecting a club-house upon land of which it held a lease.

The defendant is a corporation formed under the Pub. Stats. c. 115, § 2, for encouraging athletic exercises. By sec. 7 it "may hold real and personal estate, and may hire, purchase, or erect suitable buildings for its accommodation, to an amount not exceeding five hundred thousand dollars," etc. We are of opinion that under these words the defendant had power to take a lease of land and to erect a suitable club-house upon it. Having this power, it was entitled to raise money for the purpose. No argument is needed to show that the power at the end of sec. 7, to receive and hold in trust funds received by gift or bequest, does not confine the corporations to that mode of raising it. Borrowing money is a usual and proper means of accomplishing what the statute expressly permits. See *Fay v. Noble*, 12 Cush. 1, 18; *Morville v. American Tract Society*, 123 Mass. 129, 136; *Davis v. Old Colony Railroad*, 131 Mass. 258, 271, 275. As this is a sufficient reason for giving the plaintiff judgment, it is unnecessary to consider whether there are not others.

Judgment for the plaintiff.

under the seal of the Court
WRIGHT *et al.* v. THE PIPE LINE CO. *et al.*

IN THE SUPREME COURT OF PENNSYLVANIA, OCTOBER 3, 1882.

[Reported in 101 Pennsylvania State Reports 204.]

BEFORE SHARSWOOD, Ch. J.; MERCER, GORDON, PAXSON, TRUNKEY, STERRETT, and GREEN, JJ.

Error to the Court of Common Pleas of Venango County; of October Term, 1882, No. 103.

This was an action of assumpsit by Charles B. Wright and William H. Kemble against the Antwerp Pipe Co. and the Oil

City Pipe Co. on a promissory note. Defendants pleaded specially, that the consideration of the note was illegal.

On the trial, before Taylor, P. J., the following facts appeared: The note in suit was the joint obligation of the two corporations defendant, given as part payment for certain shares of the stock of the Pennsylvania Transportation Co., drawn to the order of Henry Harley, agent of said company, and by him endorsed for value before maturity to the plaintiffs; who knew that the consideration therefor was stock in the Transportation Co. The stock was bought by the defendants in pursuance of a contract between them and Harley, and was delivered to and accepted by them, before the plaintiffs discounted the note.

The Antwerp Pipe Co. was incorporated under the act of July 18, 1863, and its supplement of March 12, 1867 (2 Purd. 1408), and the Oil City Pipe Co. was organized under the act of April 29, 1874 (P. L. 73).

The latter act provides, *inter alia*, that it shall not be lawful for a corporation organized under it to use any of its funds in the purchase of stock in any other corporation, or to hold the same except as collateral security for a prior indebtedness.

The defendants in their special plea alleged that the contract for the purchase of the stock "was unauthorized by law or by the terms or provisions of the charters creating the defendant corporations, and was in all respects beyond the powers and authority of the officers and directors of the defendant corporations to make, and was unlawful and void; that Henry Harley, the payee, at the time the note was made and delivered to him, knew that the defendants were corporations organized under the laws of Pennsylvania, and that the note was null and void; and that the plaintiffs, at the time they negotiated for and received the note, knew that the defendants were corporations, as aforesaid, and that the consideration for the said note, and the contract under which it was given, was unauthorized by law, null and void."

The court instructed the jury that the consideration for the note was illegal, under the act of 1874, and that the plaintiffs, who knew the purpose for which the same was given, were affected with knowledge of the law, and, therefore, could not recover.

Verdict and judgment for defendants; whereupon the plaintiffs took this writ, assigning for error the above instruction to the jury.

Wm. S. Lane and *C. Heydrick* for plaintiffs in error.

Osmer, Dale & Freeman for defendants in error.

PAXSON, J., delivered the opinion of the court, November 20, 1882.

It is conceded that the plaintiffs are holders for value of the note

given in consideration of the stock.

in controversy, and that they are not affected with notice of any fraud on the part of Harley, the payee. It was alleged, however, that the consideration of the note was illegal, and that the plaintiffs knew, or were affected with notice of this fact.

The note is the joint note of the Antwerp Pipe Co. and the Oil City Pipe Co., and was given in part payment of eighteen thousand three hundred and sixty shares of the stock of the Pennsylvania Transportation Co. The Oil City Pipe Co. was organized under the provisions of the act of April 29, 1874, and under that act it is provided that it should not be lawful for any corporation organized under it to use any of its funds in the purchase of stock in any other corporation, or to hold the same, except as collateral security for prior indebtedness. The court below instructed the jury that the consideration of the note being unlawful, the plaintiffs could not recover. This ruling is the only material error assigned.

The note contained upon its face no evidence of illegality, and was issued by corporations having ample power to make and issue commercial paper.¹ The contract claimed to be illegal had been fully executed, and the stock delivered. If the Oil City Pipe Line Co. exceeded its corporate powers in the purchase of this stock, can it now repudiate its note in the hands of a holder for value upon the ground that the transaction out of which it grew was

¹ The savings bank was incorporated by a special act, with the usual powers of a savings bank—to receive money on deposit and invest the same for the benefit of depositors. Pamph. L. 1863, p. 431. The charter gave no express power to make negotiable paper. The only provision on that subject is that the institution should not issue any notes or bills—a provision designed to interdict the business of banking. *Allaire v. Howell Works*, 2 Green, 21.

The powers of a corporation are twofold—those that are derived from express grant and those that are incident and necessarily appertain to it, whether expressed in the grant or not. *Leggett v. N. J. Manufacturing Co.*, Saxt. 541. Every corporation created for transacting business, unless restrained by its charter or some statute, has, as a necessary incident, the power of incurring debts in the course of its legitimate business, and of making and endorsing negotiable paper in payment of such debts. *Lucas v. Pitney*, 3 Dutcher, 221; *The National Bank of Republic v. Young, Receiver*, 14 Stew. Eq. 531; *Stratton v. Allen*, 1 C. E. Green, 229; *Curtis v. Leavitt*, 15 N. Y. 9; 1 Dan. Neg. Inst., § 382. In discussing this subject, *Beasley, Ch. J.*, declares that such a power “is the appropriate product of the principle that corporate powers which are the necessary accompaniments of powers conferred will be implied,” and that in those instances where “the ability to borrow money is so essential that without it the business authorized could not be conducted with reasonable efficiency, as it cannot be supposed that it was the legislative intent to leave the company in so imperfect a condition, the inference is properly drawn that the power to raise money in this mode is inherent in the very constitution of such corporate bodies.” *Town of Hackettstown v. Swackhamer*, 8 Vroom,

ultra vires? The law never sustains a defense of this nature out of regard for a defendant; it does so only where an imperative rule of public policy requires it. The instances are rare in which a corporation or individual has been permitted to set up its own wrong in order to retain both the property and its price. The defendant corporations have obtained the stock which they now allege they had no right to buy, and propose to retain it without payment. It would be difficult to imagine a defense with less merit, and the law would be exceedingly impotent were it to allow it to succeed. The very point was decided in the *Oil Creek & Allegheny River Railroad Co. v. The Pennsylvania Transportation Co.*, 2 Norris, 160, where it was held that where a corporation has entered into a contract which has been fully executed on

191. In *Lucas v. Pitney*, Green, Ch. J., said that "the power of incurring debts in the course of its legitimate business of giving notes or borrowing money for the payment of such debts, would seem necessarily incident to every corporation whose business involved the expenditure of large sums of money, and often upon sudden and unforeseen contingencies."

In *Mutual Life Insurance Co. v. McKelway*, 1 Beas. 133, Chancellor Williamson recognized this power of borrowing money and making contracts for loans, as an incidental power residing in a mutual insurance company, as the means necessary to raise money in case the company should incur a loss and not have the available means to meet it without contracting for a loan to meet the emergency.

Savings banks are established for business purposes. Their functions are to receive, hold, and invest moneys that may be deposited with them, and to repay the money deposited under reasonable regulations in their by-laws. In order to make the business successful, these institutions are required to keep their money invested as closely as may be consistent with the ordinary demands of depositors. But in seasons of financial excitements they may be subjected to extraordinary demands from depositors, to meet which and save the credit of the institutions large sums of money may be required to be raised on sudden and unforeseen contingencies. At such times the securities such institutions usually hold are likely to be depressed in the market and unsalable, except at ruinous sacrifices. If these institutions should not have the power to borrow money and to make negotiable paper, or make a pledge of securities on which money may be borrowed temporarily, great sacrifices in the sale of the securities in which the trust funds are invested, if not financial ruin, would be the probable result of every unexpected run upon the bank by depositors to withdraw their deposits. It is the existence of conditions and contingencies of this kind likely to arise in the conduct of business that the law recognizes as the ground for raising by implication a power in corporations to borrow money and give negotiable security as a means of borrowing. And the defendant, finding these negotiable securities in the possession of the City Bank as the ostensible owner, as a pledge for a note of the savings bank, which the City Bank apparently held under discount as business paper, had a right to act upon the assumption that the loan had been obtained and the securities had been pledged for a purpose which gave the pledge validity. *The National Bank of Republic v. Young*, Receiver, 14 Stew. Eq. 531.—*Depue, J.*, *Fifth Ward Savings Bank v. First National Bank*, 48 N. J. L. 513, 523-525.—Ed.

one part, and nothing remains but for it to pay the consideration money, it will not be allowed to set up that the contract is *ultra vires*. This judgment was approved by all the members of the court who heard the argument, and was but declaratory of the law as ruled in a number of earlier cases. In *Swan v. Scott*, 11 S. & R. 164, it was said by Duncan, J.: "The test whether a demand connected with an illegal transaction is capable of being enforced at law is, whether the plaintiff requires the aid of the illegal transaction to establish his case." The converse of this proposition is equally true: that where the plaintiff has made out his case without calling the illegal transaction to his aid, the defendant who has enjoyed its benefits cannot set up the defense of *ultra vires*. In *Northampton County's Appeal*, 6 Casey, 305, it was said by Porter, J.: "A man who has enjoyed a privilege has no right to say that because he ought not to have enjoyed it he will not pay for it. However unlawful the act, it would be unsound policy to give him this immunity." To the same point are the remarks of Gibson, Ch. J., in *Lestapies v. Ingraham*, 5 Barr, p. 81: "True it is that an illegal contract will not be executed; but when it has been executed by the parties themselves, and the illegal object of it has been accomplished, the money or thing which was the price of it may be a legal consideration between the parties for a promise, express or implied, and the court will not unravel the transaction to discover its origin." In *Hipple v. Rice*, 4 Casey, 406, it was held, that where lots in a town were disposed of by lottery, each purchaser of a ticket being entitled to a lot of equal size and value, to be determined by the drawing, and the owner of the land after the drawing of the lottery made a deed to the grantee in which the making of the lottery, the purchase of the ticket by the grantee, and the drawing of the number, were recited, and in which same deed the grantor reserved a ground-rent of one dollar per year, a subsequent holder of the title of the grantee could not set up the lottery as a defense to the payment of the ground rent. In *Bly v. Second National Bank of Titusville* an indorsee upon a note discounted by the bank defended upon the ground that the loan was in contravention of the twenty-ninth section of the act of Congress of June 3, 1864, commonly called the National Bank Act, which provides that "The actual liabilities to any association, of any person or of any company, corporation or firm, for money borrowed . . . shall at no time exceed one-tenth part of the amount of the capital stock of such association actually paid in." The court below, Trunkley, J., in an opinion which was adopted by this court, held the defense insufficient, and said: "The plaintiff needs no aid from the original transaction to make out his case. Garfield is no party to the note. The de-

fendant attempts its defeat, not by showing anything done at the time it was given, but because of the turpitude of the borrower and lender when Garfield borrowed money of the bank in excess of the amount the latter was permitted to loan to one person."

When the plaintiffs offered the note in evidence they had a perfect *prima facie* case, and did not need the aid of any illegal transaction to entitle them to a verdict. They required no aid from the contract for the sale of the stock. That, as before observed, had been fully executed, and was a matter with which the plaintiffs had nothing whatever to do.

After the plaintiffs had made out their case the defendants set up their want of corporate power to buy the stock, by way of defense. This with the stock transferred to them and unpaid for. The effect of this defense, if successful, would be to punish innocent parties who had no connection with the illegal transaction for the wrongful act of the defendant corporations.

It may be that as between the original parties the defendants could have rescinded the contract and declined to receive the stock. But they executed it; they accepted the stock and gave their note in payment, for which note the plaintiffs paid value in good faith. The defense of *ultra vires* by a corporation comes with a better grace if made before it has discovered that it has made a bad bargain.

If, as the defendants allege, they have violated their charter, it is a matter that is within the cognizance of the Attorney-General. Judgment reversed and a *venire facias de novo* awarded.

THE NATIONAL PARK BANK OF NEW YORK, RESPOND-
ENT, v. THE GERMAN-AMERICAN MUTUAL WARE-
HOUSING & SECURITY CO., IM-
PLEADED, ETC., APPELLANT.

IN THE COURT OF APPEALS OF NEW YORK, OCTOBER 8, 1889.

[Reported in 116 New York Reports 281.]

William H. Ingersoll for appellant.

Francis C. Barlow for respondent.

FOLLETT, Ch. J.¹ The statute by which the defendant was incorporated provides that, in addition to the powers therein enumerated, it shall possess all the powers and privileges of corporations organized under the manufacturing act (c. 40, Laws

¹ The statement of facts has been omitted.—Ed.

1848), and the acts extending and amending the same, except wherein such acts are inconsistent with the provisions of the incorporating statute. The litigants agree that the defendant's Board of Directors had power to authorize its president to make and endorse promissory notes for the purpose of transacting the business it was authorized to engage in, and that such power was conferred by the board on its president. The powers of corporations are those enumerated in the statutes under which they are incorporated, in general statutes, in the articles of association, and like instruments executed in pursuance of the statutes, denominated by Mr. Brice "constating instruments" (*Ultra Vires* [2d Am. ed] 27), and also such powers as flow from or are incidental and necessary to the exercise of the enumerated powers. 1 R. S., 599, §§ 1-3. Counsel have not directed our attention to, nor have we found in any of the statutes referred to, a provision empowering the defendant to bind itself by making or endorsing promissory notes for the accommodation of the makers for a consideration paid.

It is well settled that such a power is not incidental to the powers expressly conferred on corporations organized under statutes authorizing the formation of corporations for banking, insuring, manufacturing, and like business corporations. *Central Bank v. Empire Stone Dressing Co.*, 26 Barb. 23; *Bridgeport City Bank v. Same*, 30 *id.* 421; *Farmers' and Mechanics' Bank v. Same*, 5 Bosw. 275; *Morford v. Farmers' Bank of Saratoga*, 26 Barb. 568; *Bank of Genesee v. Patchin Bank*, 13 N. Y. 309; *Ætna National Bank v. Charter Oak Life Ins. Co.*, 50 Conn. 167; *Monument National Bank v. Globe Works*, 101 Mass. 57; *Davis v. Old Colony R. R. Co.*, 131 *id.* 258; *Culver v. Reno Real Estate Co.*, 91 Penn. 367; *Hall v. Auburn Turnpike Co.*, 27 Cal. 255. The defendant having the general power to bind itself by promissory notes and contracts of endorsement, the plaintiff is entitled to recover if it is a holder of the notes for value and without notice that they were endorsed for the accommodation of the makers, and not in the usual course of business. The referee finds that in consideration of one-fourth of one per cent. per month for every month of the time on which the notes were given, the defendant endorsed for Squires, Taylor & Co. between November 10, 1876, and August 27, 1878, the date of the first note in suit, nineteen notes precisely like the four in suit, except dates and amounts, aggregating \$170,000, which were discounted by the plaintiff for, and the avails placed to the credit of, Squires, Taylor & Co.

The referee also finds that defendant's president was never authorized by its Board of Directors to endorse commercial paper for the accommodation of makers, or to endorse such paper for a

consideration paid by the makers, and that none of them knew that such endorsements had been made until this action was brought.

The fact that the maker of a promissory note procures it to be discounted for his own benefit is, if unexplained, notice to the discounteer that the endorsement is not in the usual course of business, but it is for the accommodation of the maker. *Stall v. Catskill Bank*, 18 Wend. 466; *Fielden v. Lahens*, 9 Bosw. 436; 3 Trans. App. 218; 2 Abb. Ct. App. Dec. 111; 6 Abb. (N. S.) 341; 1 Ames' Cas. on Bills and Notes, 738; *Bank of Vergennes v. Cameron*, 7 Barb. 143; *Hendrie v. Berkowitz*, 37 Cal. 113; *Lemoine v. Bank of North America*, 3 Dillon, 44; *Bloom v. Helm*, 53 Miss. 21; *Daniel on Neg. Inst.* (2d ed.) 297, § 365; *Edw. on Bills* (3d ed.) 98, § 105.

Ex parte Estabrook, 2 Lowell's Dec. 547, is opposed to these authorities, but this case is in conflict with the decisions in this State, and we believe it to be without the support of any well-considered case.

The endorsements having been made for the accommodation of the makers, and the plaintiff, having discounted the notes with notice of that fact, cannot recover.

The judgment should be reversed and a new trial granted, with costs to abide the event.

All concur.

Judgment reversed.

SECTION IV.—POWER TO TAKE AND HOLD PROPERTY.

NICOLL *v.* THE NEW YORK & ERIE RAILROAD CO.

IN THE COURT OF APPEALS OF NEW YORK, DECEMBER TERM,
1854.

[*Reported in 12 New York Reports 121.*]

EJECTMENT commenced in the Supreme Court in February, 1847, and tried at Orange County Circuit, held by Edwards, J., in October, 1848. The jury found a special verdict, from which it appeared that on the first day of July, 1836, Nicholas A. Dederer, being the owner in fee simple of a farm situate in Blooming Grove, Orange County, executed to the Hudson & Delaware Railroad Co. a deed, dated that day, whereby, in consideration of the benefits and advantages to him of the railroad proposed to be made by the company, and of one dollar to him paid by the company, he granted to such company the privilege of surveying and laying out, by its agents and engineers, through his farm or tract

of land, the route and site of its road ; and also granted, bargained, sold, and conveyed unto the company and its successors so much of the farm as might be selected and laid out by the company for the site of its railroad, six rods in width across the farm ; provided always, and such grant was made upon the express condition, that the company should construct its railroad within the time prescribed by the act incorporating the same. That subsequently, and before the 27th of October, 1836, the company selected and laid out, for the site of its railroad through the farm, a strip of land six rods wide extending through the farm. That on the 1st of April, 1844, the farm formerly owned by Dederer, by virtue of sundry mesne conveyances, became the property of the plaintiff in fee simple, subject only to such right as the Hudson & Delaware Railroad Co. then had to any portion thereof sufficient for the track of its road. That this company on the 27th of October, 1836, commenced the construction of its railroad, but never completed or put in operation a double or single track or any part thereof. That in pursuance of an act of the legislature, entitled an act authorizing the New York & Erie Railroad Co. to construct a branch road, terminating at the village of Newburg, passed April 8, 1845, the Hudson & Delaware Railroad Co. were authorized to, and on the 14th of September, 1846, did, execute to the defendant, the New York & Erie Railroad Co., a deed, and thereby for a valuable consideration granted, bargained, sold, and conveyed to the defendant and its successors the maps, charts, drafts, surveys, and other personal property of the Hudson & Delaware Co. and all its rights, privileges, immunities, and improvements acquired under and by virtue of the original act of incorporation or of any act amending it, or in any other manner ; and also all the grants, lands, and real estate acquired by or ceded or conveyed to the Hudson & Delaware Co., and all its right, title, and interest to the same, and particularly the right of way granted by Dederer to the company and its successors, by the deed from him above mentioned. That when this suit was commenced, on the 25th of February, 1847, the defendant had not completed or put in operation its branch road terminating at Newburg, or any part of it, nor had it done so when the cause was tried. That on the 2d of December, 1846, the defendant entered upon the strip of land six rods wide, mentioned in the deed from Dederer, and laid out by the Hudson & Delaware Co. through his farm as the site of its road, and ejected the plaintiff therefrom, and that the defendant was still in the possession thereof. The suit was brought to recover possession of this strip of land from the defendant.

The justice before whom this cause was tried ordered judgment

upon the special verdict in favor of the plaintiff. The defendant appealed, and the Supreme Court, sitting in General Term in the Third District, reversed the judgment and gave judgment in favor of the defendant. See 12 Barb. 460. The plaintiff appealed to this court.

E. L. Fancher for appellant.

T. M. Kissock for the respondent.

PARKER, J. The grant from Dederer to the Hudson & Delaware Railroad Co., bearing date the first day of July, 1836, was made to that company "and their successors." Under that grant there can be no doubt the Hudson & Delaware Railroad Co. took a fee. The words of perpetuity used would have been sufficient to describe a fee, even under the most strict requirements of the common law.

The company had ample power to purchase lands. It was a power incident at common law to all corporations, unless they were specially restrained by their charters or by statute. 2 Kent, 281; Co. Litt. 44a, 300b; 1 Kyd on Corp. 76, 78, 108, 115; 3 Pick. 239. And in this case the power was expressly conferred by the 9th section of the charter (Sess. Laws of 1835, p. 113); and by the 16th section there were given to it the general powers conferred upon corporations (1 R. S. 731), one of which is that of holding, purchasing, and conveying such real estate as the purposes of the corporation may require. But if no words of perpetuity had been used, the grantor owning a fee, the company would have taken a fee; for the statute is now imperative, that every grant shall pass all the estate or interest of the grantor, unless the intent to pass a less estate or interest shall appear by express terms or be necessarily implied in the terms of the grant. 1 R. S. 748, § 1.

But it is objected that because, by the act of incorporation, there was given to it only a term of existence of fifty years (Laws of 1835, p. 110, § 1), therefore the grant shall be deemed to have conveyed an estate for years, and not in fee. The unsoundness of that position is easily shown. It was never yet held that a grant of a fee in express terms could be restricted by the fact that the grantee had but a limited term of existence. If it were so, a grant could never be made to an individual in fee, because in his earthly existence he is not immortal. Under such a rule, a man could never buy a greater interest in a farm than a life estate. It would follow that all estates would be life estates, except those held by perpetual corporations. The intent of parties, fully expressed in a deed, would avail nothing, but all grants would be measured by the mortality of the grantee. It is needless to follow out the proposition farther to show its absurdity.

It is not to the parties to a grant, but to its terms, that we look to ascertain the character and extent of the estate conveyed. Such was the rule at common law, and is still by statute. 1 R. S. 748, § 1. The change made by the statute favors the grantee, where there are no express terms in the grant, by presuming the grantor intended to convey all his estate.

At common law, it was only where there were no express terms defining the estate in the conveyance that the term of legal existence of the grantee was deemed to be the measure of the interest intended to be conveyed. Thus, words of perpetuity, such as "heirs or successors," were necessary to convey a fee. A grant to an individual without such words conveyed only a life estate. For the same reason a grant without such words to a corporation aggregate (Viner's Ab., Estate, L. 3), or to a mayor or commonalty (*ib.*, 3), conveyed a fee, because the grantees were perpetual. The grantee named in such case having a perpetual existence, the estate could not have been enlarged by words of succession.

But this is now changed by our Revised Statutes. Words of inheritance or succession are no longer necessary, and in their absence we look, not to the term of existence of the grantee to ascertain the estate, but to the amount of interest owned by the grantor at the time he conveyed. All his estate is deemed to have passed by the grant. 1 R. S. 748, § 1.

All this is applicable only to cases where the grant is silent as to the extent of interest conveyed. Where that interest is expressly described, as in this case, the law never, either before or since our revision, did violence to the intent of the parties, by cutting down the estate agreed to be conveyed to the measure of the grantee's term of existence. It has long been one of the maxims of the law that "no implication shall be allowed against an express estate limited by express words." Viner's Ab., Implication, A. 5; 1 Salk. 236.

It is erroneous to say that an estate in fee cannot be fully enjoyed by a natural person, or by a corporation of limited duration. It is an enjoyment of the fee to possess it and to have the full control of it, including the power of alienation, by which its full value may at once be realized.

It is well settled that corporations, though limited in their duration, may purchase and hold a fee, and they may sell such real estate whenever they shall find it no longer necessary or convenient. 5 Denio, 389; 2 Preston on Estates, 50. Kent says: "Corporations have a fee simple for the purpose of alienation, but they have only a determinable fee for the purpose of enjoyment. On the dissolution of the corporation, the reverter

is to the original grantor or his heirs; but the grantor will be excluded by the alienation in fee, and in that way the corporation may defeat the possibility of a reverter." 2 Kent, 282; 5 Denio, 389; 1 Comst. R. 509. Large sums of money are accordingly expended by railroad companies in erecting extensive station houses and depots, and by banking corporations in erecting banking houses, because, holding the land in fee, they may be able to reimburse themselves for the outlay by selling the fee before the termination of their corporate existence.

The Hudson & Delaware Railroad Co. then, by their grant from Dederer, took a title in fee, but it was a fee upon condition, there being in the grant an express condition that the road should be constructed by the company within the time prescribed by the act of incorporation. This was not a condition precedent, as was argued by the plaintiff's counsel, but a condition subsequent.¹

A mere failure to perform a condition subsequent does not divest the estate.²

Upon the whole, my conclusion in this case is that the Hudson & Delaware Railroad Co. took from Dederer a fee upon condition subsequent; that at the time of the conveyance by Dederer to the plaintiff there had been no forfeiture; and that Dederer had at the time of such conveyance no assignable interest in the premises.

The judgment of the Supreme Court should be affirmed.³

Judgment accordingly.

not overruled.

THE OCCUM CO. v. THE A. & W. SPRAGUE MANUFACTURING CO.

519
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IN THE SUPREME COURT OF ERRORS OF CONNECTICUT, MARCH TERM, 1868.

[Reported in 34 Connecticut Reports 529.]

CASE, for an injury to a mill and a mill-site of the plaintiffs by the flowing of the same by the defendants, owners of a lower dam and mill; brought to the Superior Court in New London County, and tried to the jury on the general issue before Park, J.⁴

¹ So much of the opinion as relates to this question has been omitted.—Ed.

² So much of the opinion as relates to this question has been omitted.—Ed.

³ The concurring opinion of Gardiner, Ch. J., has been omitted.—Ed.

⁴ The statement is not given in full.—Ed.

The parties were both corporations. The plaintiffs claimed title under a lease for twenty years from Ebenezer Waldo and Elizabeth Waldo, dated December 9, 1865.

The defendants further offered evidence to prove, and claimed that they had proved, that the mill and works occupied by the plaintiffs, and which they claimed had been injured by the dam of the defendants, were of a trifling and frivolous character, so situated as to be, and in fact were, absolutely worthless for manufacturing or mechanical purposes, or for any business connected therewith, and that the same were procured and the lease obtained by the plaintiffs for the express purpose, and only for the purpose, of commencing a suit against the defendants, and harassing them under the forms of law; and the defendants prayed the court to instruct the jury that such proceedings were not warranted by the plaintiffs' charter, and that if the jury should find such facts proved the plaintiffs could not recover. The court omitted so to charge the jury, and gave no instruction to them on the question.

The jury having returned a verdict for the plaintiffs, the defendants moved for a new trial for errors in the rulings and charge of the court.

Foster in support of the motion.

Wait and Halsey, with whom were *Hovey* and *Pratt*, *contra*.

CARPENTER, J. It is apparent from the record in this case that three general questions, mainly of fact, were raised by the defendants for the consideration of the jury.

1. Did the defendants' grantors erect the dam complained of under a license from the lessors of the plaintiffs?

2. Did the defendants merely continue the dam as previously erected, or did they by means of flash-boards raise the water higher than it was raised by the former proprietors?

3. Were the plaintiffs in commencing and prosecuting this suit acting within the scope of their corporate powers?¹

Under each branch of the case a question of law is raised for the consideration of this court.

3. The motion finds that "the defendants further offered evidence to prove, and claimed that they had proved, that the mill and works described in the plaintiffs' declaration, and which they claim had been injured by the dam of the defendants, were of a trifling and frivolous character, so situated as to be, and in fact were, absolutely worthless for manufacturing or mechanical purposes, or for any business connected therewith; and that the same were procured and the lease obtained by the plaintiffs for the express purpose, and only for the purpose, of commencing a suit

Only so much of the opinion is given as relates to this question.—Ed.

against the defendants and harassing them under the forms of law. And the defendants prayed the court to instruct the jury that such proceedings were not warranted by the plaintiffs' charter; and that if the jury should find such facts proved, the plaintiffs could not recover. The court omitted so to charge the jury, and gave no instruction to them on the question." The counsel for the plaintiffs contend that the motive with which the plaintiffs leased this property can have no effect upon their legal rights, and that, no matter what purpose they had in view, they had a right to institute a suit for the infringement of those rights. In support of this position they cite *McCune v. Norwich City Gas Co.*, 30 Conn. 521, and *Benjamin v. Wheeler*, 8 Gray, 409. We have no disposition to question the authority of those cases. They do not seem to us, however, to meet the question involved here. There is a manifest distinction between the motive with which an act is done and a legal right to do the act itself. This distinction seems to have been overlooked, both by the court below and by the plaintiffs' counsel. They treat it purely as a question of motive, whereas the defendants' claim cuts deeper, and denies the legal right to do the act itself. They deny the plaintiffs' power under their charter to lease the property and erect the mill for the purpose named; and consequently the right to maintain an action for an injury to the property. This distinction is clearly recognized in both the cases cited. In the case of *McCune v. Norwich City Gas Co.* the action was brought to recover damages for cutting off the supply of gas. The plaintiff claimed that the defendants did it maliciously and wantonly and with intent to injure him. The court held that the defendants had a legal right to do the act, and that the motive with which it was done was immaterial. The court say: "Where a party has a legal right to do a particular act at pleasure, the motive which induced the doing of the act at the time in question can never affect his legal liability for the act." In *Benjamin v. Wheeler* the plaintiff sought to recover damages for an injury occasioned by digging a water-course in the highway in front of his land. The defendants justified under authority from the highway surveyor. The plaintiff claimed that the act was done wantonly and for the purpose of injuring him. The court held that the action could not be maintained. Thomas, J., who delivered the opinion of the court, says: "Nor was it competent to show that the thing done was done for the purpose of injuring the plaintiff. An act done within the scope of the officer's authority does not become illegal by reason of the motive which may have influenced his mind in doing it." The question before us is, whether the plaintiffs were acting within the scope of their authority. Concede that and the intent is immaterial. But in de-

termining that question, the use they intended to make of it, and did in fact make of it, is material. The intentions and purposes of the party in leasing and erecting a mill not only qualify and give character to the act, but enter into and become a part of the act itself.

The plaintiffs are a corporation. Their rights and powers are created and limited by their charter. They can do no act unless therein expressly or impliedly authorized. Any act done or attempted to be done not so authorized will not lay the foundation for a suit in their behalf. *New York Firemen's Insurance Co. v. Ely*, 5 Conn. 560; *Goodspeed v. East Haddam Bank*, 22 Conn. 530.

See We are not aware of any principle of law that will allow corporations, chartered and organized for specific purposes, to purchase or lease property, having no connection with their legitimate business, for the sole purpose of commencing and prosecuting a suit, and harassing another under the forms of law. We think, therefore, that it was competent for the defendants to show, if the fact was so, that the plaintiffs in these proceedings were acting outside the limits of their corporate powers, and that the omission of the court to submit this question to the jury with proper instructions was erroneous.

A new trial is advised.

In this opinion the other judges concurred; except PARK, J., who, having tried the case in the court below, did not sit.

FREDERICK J. LANCASTER, PLAINTIFF, v. THE AMSTERDAM IMPROVEMENT CO., DEFENDANT.

IN THE COURT OF APPEALS OF NEW YORK, JANUARY 16, 1894.

[*Reported in 140 New York Reports 576.*]

CROSS APPEALS from judgment of the General Term of the Supreme Court in the First Judicial Department, entered upon an order made October 13, 1893, which directed judgment in favor of plaintiff upon a case submitted under sec. 1279 of the Code of Civil Procedure.

This was a submission of a controversy to the General Term in the First Department upon agreed facts.

The Amsterdam Improvement Co. was incorporated under the laws of the State of New Jersey, in May, 1891, by five persons; of whom one only was a resident of that State, the others being

residents of this State. Its certificate of incorporation, filed that day, contained the following article :

" 2. That the places in this State, where the business of such company is to be conducted, are Jersey City and the city of Hoboken, in the county of Hudson. The principal part of the business of said company within this State is to be transacted at Jersey City, in the county of Hudson, and the places out of this State where the same is to be conducted and where the company proposes to carry on operations are the cities of New York and Brooklyn, in the State of New York; and that the objects for which said company is formed are the purchase and sale of real property, both improved and unimproved, the improvement of such property as may be purchased, and which, when purchased, is unimproved, the exchange of property for other property, the lending of moneys upon first and second mortgages, secured by bonds, and the purchase and sale, by assignment or otherwise, of such mortgages and bonds.// The portion of the business of said company which is to be carried on out of this State in the said cities of New York and Brooklyn will be such as will come under the head of the objects for which this company is formed. The principal office or place of business of said company, out of this State, is the city of New York, in the County and State of New York."

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On December 21, 1892, the Secretary of State of the State of New York issued a certificate, of which the following is a copy :

" STATE OF NEW YORK.

" *Office of the Secretary of State, Albany.*

" It is hereby certified that the Amsterdam Improvement Co., which appears from the papers filed in this office on the 21st day of December, 1892, to be a foreign stock corporation, organized and existing under the laws of the State of New Jersey, has complied with all the requirements of law to authorize it to do business in this State, and that the business of such corporation to be carried on in this State is such as may be lawfully carried on by a corporation incorporated under the laws of this State, for such or similar business."

certified

The statute under which this company was incorporated provided that " It shall be lawful for three or more persons to associate themselves into a company to carry on any kind of manufacturing, mining, chemical, trading, or agricultural business, agricultural fairs and exhibitions for the encouragement of competition in agriculture, horticulture, breed of stock, and development of speed in horses, the transportation of goods, merchandise or passengers upon land or water, inland navigation, the

building of houses, vessels, wharves or docks, or other mechanical business, the reclamation and improvement of submerged lands, the improvement and sale of lands," etc.

This statute also provided that corporations shall have the power "To hold, purchase, and convey such real and personal property as the purposes of the corporation shall require, not exceeding the amount limited in its charter, and all other real estate which shall have been *bona fide* mortgaged to the said company by way of security, or conveyed to them in satisfaction of debts previously contracted in the course of dealings, or purchased at sales upon judgment or decree which shall be obtained for such debts."

Other provisions authorized a company organized under the statute to carry on a part of its business, and to have offices out of the State, and that "they may hold, purchase and convey real and personal property out of the State, the same as if such real and personal property were situated in the State of New Jersey, provided that the certificate of organization shall state," etc. Another provision authorized any New Jersey corporation, incorporated under any general or special act, to conduct its business outside the State.

May 23, 1891, Arthur P. Smith was the owner of a lot of vacant and unimproved land in the city of New York, which, by a deed dated that day and duly recorded May 25, 1891, he conveyed to the defendant. On the 15th day of January, 1893, the plaintiff and the defendant entered into a written contract whereby they agreed to exchange said lot of land for another lot of land owned by the plaintiff. The land of the plaintiff was valued at \$72,000, and the land of the defendant at \$49,500, and the difference, \$18,500, the defendant agreed to pay to the plaintiff at the times and in the manner specified in the contract. It was agreed that the deeds should be exchanged at a place named on or before February 15, 1893. Pursuant to said contract the defendant executed a deed in due form by which it assumed to convey the premises to the plaintiff.

It is conceded that the defendant has done no business in the State of New Jersey, and that the only business or transactions in which it has been engaged since its organization have been carried on in the city and county of New York.

The following question was submitted to the General Term:

"Whether said defendant, the Amsterdam Improvement Co., possessed, and has conveyed to Frederick J. Lancaster, the plaintiff herein, a good and sufficient title to the premises described in said contract and deed." That court has adjudged that the defendant's deed did not convey to the plaintiff a good title, and

that its title was subject to the right, title and interest of the People of the State, whose title was, at the time of the execution and delivery of the deed, superior and prior to that of the defendant.

Thomas P. Bassford for plaintiff.

Louis Marshall and *Hugo S. Mack* for defendant.

GRAY, J. The principal question for our consideration is one of great importance; for upon its decision not only depend large interests, but a judicial definition of State policy. That question may be thus succinctly stated: Under our laws can a foreign corporation, incorporated for the purpose of dealing in the purchase and sale of real property, come into this State and transact here such kind of corporate business?¹ The General Term put the question in somewhat different form: Whether it may "purchase and hold lands within this State which are not necessary for its business and which have not been acquired in securing the payment of a debt due to it." That is hardly exact, as applied to the case of this corporation. As I have shaped it, the question is certainly made broad enough.

The opinion of the General Term was delivered by Follett, J., whose opinions are entitled to the highest respect, and he negatives the proposition embodied in the question, upon the ground, in substance, that from certain general statutes of this State, which relate to the right of foreign corporations to purchase, or acquire, and to convey real property, and from numerous special acts, passed to authorize them to acquire lands, it is to be inferred that "it is contrary to the policy of this State to permit such corporations to take, hold and convey lands in this State, without being specially authorized so to do." The general statutes to which he refers are c. 158 of the Laws of 1877 and c. 450 of the Laws of 1887, and he considers that to their declarations is to be referred, solely, the question of the right of foreign corporations, generally, to acquire, hold, and convey lands; for they alone recognize their right in such respects. The act of 1877 authorized a foreign corporation to purchase at a sale under the foreclosure of a mortgage or under a judgment held by it; to hold the land purchased for not exceeding five years, and to convey it, etc. The act of 1887 authorized a foreign corporation, doing business in this State, to acquire such real property as might be necessary for its corporate purposes in the transaction of its business here. Both provisions were re-enacted in the "General Corporation Law" of 1892 (c. 687, Laws of 1892), as secs. 17 and 18.

In order to uphold the validity of the conveyance in question here, I think we might very safely rest our conclusion upon the enactment of 1887, if other grounds were lacking. We might,

¹ Only so much of the opinion is given as relates to this question.—Ed.

without doing violence to any rule of law, say that that act was such sufficient authority as to make the title to the land conveyed by the foreign corporation quite indefeasible in its grantee. The General Term thought it was not broad enough; but there would not be much stress in reasoning that the foreign corporation being authorized to do business here, the authorization of the act of 1887 "to acquire such real property as may be necessary for its corporate purposes in the transaction of its business in this State," even though we were disposed to define it as comprehending merely property for proposed use as an office, a warehouse, or factory, etc., would, nevertheless, be sufficient to enable the corporation in possession of land by its conveyance to vest in the grantee a good title to it. It is not for the party contracting for the conveyance of its land to raise the question of how far his grantor may have exceeded the authority given by the statutes of this State, any more than he might with respect to an alleged abuse of the powers conferred by its home charter. Those are questions between the corporation and the Government. The presumption militates in favor of the validity of the transaction, and the right of interference by the State does not extend to any forfeiture of the property held by the corporation. *In re McGraw*, 111 N. Y. 66, 96.

In *Cowell v. Springs Co.*, 100 U. S. 55, the objection was that the National Land and Improvement Co., a Pennsylvania corporation which granted certain lands in Colorado to the Springs Company, was not empowered to acquire a right to the lands, for the reason that they were not necessary to enable it to carry on its business; to which extent corporations in Colorado were limited, because of restrictions upon the legislative power in the creation of corporations. It was held that "whether the particular premises in controversy are necessary for that business is not important; that is a matter between the government of the State and the corporation, and is no concern of the defendant."

But we are not confined to any such narrow ground as a construction of the particular acts referred to. Our general laws are such as to evidence a State policy, which makes no invidious distinction against foreign corporations coming within our boundaries to extend the area of their lawful operations. The answer to the question is not to be found in the acts to which the learned General Term justices refer. If they have not overlooked they have failed, in my judgment, to give due weight and significance to other provisions upon our statute books.

The General Corporation Law, passed in 1892, contains these further provisions as to foreign corporations:

"Sec. 15. No foreign stock corporation other than a moneyed corporation shall do business in this State without having first

procured from the Secretary of State a certificate that it has complied with all the requirements of law to authorize it to do business in this State, and that the business of the corporation to be carried on in this State is such as may be lawfully carried on by a corporation incorporated under the laws of this State for such or similar purposes. . . . The Secretary of State shall deliver such certificate to every such corporation so complying with the requirements of law. No such corporation now doing business in this State shall do business herein after December 31, 1892, without having procured such certificate from the Secretary of State. . . . No foreign stock corporation doing business in this State without such certificate shall maintain any action in this State upon any contract made by it in this State until it shall have procured such certificate.

"Sec. 16. Before granting such certificate the Secretary of State shall require every such foreign corporation to file in his office a sworn copy of its charter or certificate of incorporation, and a statement under its corporate seal, particularly setting forth the business or objects of the corporation which it is engaged in carrying on, or which it proposes to carry on, within the State, and a place within the State in which is to be its principal place of business, and designating, in the manner prescribed in the Code of Civil Procedure, a person upon whom process against the corporation may be served within the State.

"The person so designated must have an office," etc.

The negative form of the legislative expression is pregnant with meaning. All foreign stock corporations are accorded the same right to transact their business here as domestic corporations have, if it be one which the latter may also lawfully transact, and provided there has been compliance with certain stated requirements. It is a recognition of the right of a foreign corporation to do business here, with the imposition of reasonable conditions. A certificate was granted by the Secretary of State, in December, 1892, which certified a compliance with all the requirements of law and that the business of the corporation to be carried on here was such as may be lawfully carried on by a corporation incorporated under our laws for such or similar business. By c. 691 of the Laws of 1892, known as "the Business Corporations Law," what restrictions may have existed upon the organization of corporations in this State, previously, were done away with. Under that law "three or more persons may become a corporation for the purpose of carrying on any lawful business," by executing and filing a certificate, which shall contain the objects for which formed, including the nature and locality of the business. The effect of all recent legislation is, most clearly, to remove all

barriers to the transaction, through incorporation, of any lawful business in this State and to recognize an equal right in the foreign corporation with that of the domestic corporation.

Presumably, in the opinion of the learned General Term justices, it was not considered that secs. 15 and 16 of the General Corporation Law include within their purview such a business as the acquisition of lands within this State by foreign corporations, for purposes not connected with necessities for a corporate use. But I do not think we can so limit the meaning of these sections. It is true that they are followed by secs. 17 and 18, to which the opinion below attaches such weight; but their presence is no warrant for ignoring the broad and general authority contained in the preceding provisions. Sec. 18 may still have an office to perform in limiting the period of time for which a foreign corporation, without a certificate here, may hold land taken for a debt, or purchased at a sale under a judgment or decree; while the necessity for retaining sec. 17 is not readily perceived. The foreign corporation, which desires to acquire real property, solely for use connected with the transaction of its business here, must, under sec. 15, procure the certificate of the Secretary of State as a condition of being permitted to carry on business and, having the certificate, its right to do business as freely as a domestic corporation, necessarily, carries with it the recognition of the right to acquire and hold what real property may be necessary for that purpose. Both sections, possibly, were retained in the revision of corporation laws out of abundant caution. Neither section is a new enactment; but merely the continuation of an existing law. Whatever the reason to be assigned for retaining secs. 17 and 18, the provisions of secs. 15 and 16 contain an authoritative declaration by the legislature, and we neither can, nor should, attempt to refine away their comprehensive meaning. Nor am I able to perceive that it is, or that it ever was, the policy of this State to prevent foreign corporations from acquiring and holding real property here, if desired for the transaction of any lawful business. To discover the public policy of a State we are limited, as it was observed by Story, J., in the *Girard Will Case*, 2 How. (U. S.) 127, to what "its constitution and laws and judicial decisions make known to us." I am aware of nothing in the Constitution upon the subject. There were no statutes passed upon the subject prior to the act of 1877, referred to, and in their silence the principle of a general right in legally constituted corporations, with sufficient chartered powers, and the principle of assent implied by the general law of comity between States, had a scope for operation in favor of the right of a foreign corporation to acquire

and hold real property here. If special enabling acts have been procured, in particular cases, they do not, necessarily, disprove the general right. Prudence and cautious counsels may have dictated their procurement. While the enactment of the statute of 1877 contained a limitation upon the right of the foreign corporation to hold real property, with respect to time, the subsequent act of 1887 was in the direction of removing such, or any, limitation. Then came the general statutes of 1892, which allowed all foreign corporations to do business here, upon compliance with conditions named, and which placed them upon a similar footing with domestic corporations, as to transaction of a corporate business. If we turn only to decisions of this court, in our investigation of what has been the public policy of this State toward foreign corporations, we find them interpreting and applying the principle of State comity in the broadest spirit. In *People v. Fire Association*, 92 N. Y. 311, it was observed that "where a State does not forbid, or its public policy, as evidenced by its laws, is not infringed, a foreign corporation may transact business within its boundaries and be entitled to the protection of its laws." In *Hollis v. Drew Seminary*, 95 N. Y. 166, it was held that "unless the legislature forbids, they" (foreign corporations) "can come here as freely as natural persons and exercise here all the powers conferred upon them by their charter, subject to the limitation imposed upon natural persons—that is, they can do no acts in violation of our laws, or of our public policy. But, unless prohibited by law, they can do here, within the limits of their chartered powers, precisely what domestic corporations can do." This decision was in line with the early case in this court of *Bard v. Poole*, 12 N. Y. 495, in which the discussion turned upon the question of the right of a corporation of the State of Maryland to make loans, secured by mortgages upon real estate within this State. Denio, J., said, in the opinion in that case, that "Any of the States of the Union may, as this and several of the other States have done, interdict foreign corporations from performing certain single acts, or conducting a particular description of business within its jurisdiction. But, in the absence of laws of that character, or in regard to transactions not within the purview of any prohibitory law and not inconsistent with the policy of the State as indicated by the general scope of its laws or Constitution, corporations are permitted by the comity of nations to make contracts and transact business in other States than those by virtue of whose laws they were created, and to enforce those contracts, if need be, in the courts of such other States. It is, of course, implied that the contract must be one which the foreign corporation is permitted by its charter to make, and it must also be one which

would be valid if made at the same place by a natural person, not a resident of that State."

It seems to me to be very clear, upon examination of our laws and by reference to such judicial opinions, that there never was a time in the history of the State when a foreign corporation was prevented from entering its boundaries to transact any lawful business which a non-resident natural person might have transacted here. What public policy is invaded, and what public interests are prejudiced, by extending to the foreign corporation, for the transaction of its business, the privileges and protection of the laws of our own State, even when that business involves the acquisition of and dealing in real property? If we were to consider the question simply in the light of a sound or a good policy, there are abundant reasons for holding that it is to the public advantage that our borders should be as much open, for all lawful purposes, to foreign corporations as to natural persons. Their advent and lawful operation cannot but tend to some advancement of our commercial interests and must advantage the commonwealth. It is the policy of the State to encourage the employment of capital here by liberal laws; upon what reasonable ground shall we recognize the natural person who comes here and refuse recognition to the foreign corporation? And how is the matter affected if the capital is employed in dealing in the acquisition and barter of lands, and not in commerce, manufacturing, or such like ways? What legal difference is there which the State can recognize if all the corporators happen to be residents of this State? The corporation is, nevertheless, a legal entity, endowed by a sister State with capacities and powers, and seeks our State as the field of its activity in the conduct of its business enterprise. Incorporations are, as a rule, advantageous to private and to public interests. As the business capacities of the general mass of mankind are constantly improving, associations of individuals, voluntarily combining their contributions, are able to perform works of various characters, which no one person is able to accomplish. I believe that to be a well-recognized principle in political economy. But we are not to consider the question as one simply of sound or of good policy, but whether there is any known public policy which is affected. What reason is there that the courts shall condemn the business proposed to be carried on by the defendant? What vice inheres in it? The case does not fall within those which the courts have decided to be against public policy. The business is not immoral in itself. That it is not prohibited by legislation I think I have been able to show.

In the opinion below it is suggested that if the defendant may legally acquire and convey land in this State at pleasure, there is

no limitation upon the amount which a foreign corporation may hold, except in its ability to purchase and pay. As applied to the case of this corporation, it might be a sufficient answer to say that the chartered purpose of dealing in the purchase and sale of real property rather negatives the idea of an intended accumulation of real estate holdings to any extraordinary extent. But a better answer would be that it is always within the power of the legislature to interfere and to regulate, if, by the magnitude of the business, the public interests are affected and seem unduly threatened. Decisions of this court might be referred to to show how far the legislative power has been deemed capable of extending in the direction of controlling a private business, on the ground that its magnitude affected the public and justified such interference.

Without prolonging the discussion, I think the General Term erred in their conclusions, and that the judgment should be reversed, and that judgment should be ordered for the defendant upon the submission, with costs.

All concur, except BARTLETT, J., not sitting.

Judgment accordingly.

FRITTS v. PALMER.

IN THE SUPREME COURT OF THE UNITED STATES, NOVEMBER 25,
1889.

[Reported in 132 United States Reports 282.]

THIS was an action in the nature of an action of ejectment. Judgment for the plaintiff, to which this writ of error was sued out. The case is stated in the opinion.

L. C. Rockwell, E. A. Reynolds and Bertram Ellis for plaintiffs in error.

Joseph Shippen for defendant in error.

HARLAN, J., delivered the opinion of the court.

This is an action in the nature of ejectment to recover the possession of certain real property in Gilpin County, Colorado, namely, the North Comstock, Grand View, Clipper and Comstock lodes, and a building lot in Central City, in the same county, together with the dwelling house thereon, the fee and possession of all which property were claimed by the plaintiff, the present defendant in error. The defendants admitted their possession of the premises described in the complaint, except the Clipper lode, and alleged their ownership and right of possession of the other property. They distinctly disclaimed all interest in the Clipper lode,

and denied that they were or had ever been in possession of it. A trial by jury was waived in writing by the parties, and the case was heard on an agreed statement of facts, upon which the court was asked to declare the law and enter judgment accordingly. Judgment was rendered in favor of the plaintiff for the possession of all the property described in the complaint, including the Clipper lode. The question to be determined is whether the judgment is supported by the agreed facts.

These facts are in substance as follows: The common source of title is William Groshon, who, on the 16th of June, 1877, at Central City, in the State of Colorado, conveyed, with warranty, all the property described in the complaint, to the Comstock Mining Co., a corporation organized under the laws of Missouri for the purpose of carrying on mining business, and with the object expressed in its articles of incorporation, of purchasing, owning and controlling mining property, both real and personal, in the State of Colorado, and of conducting a mining business therewith. This deed was duly recorded in the proper local office on the 25th of June, 1877. Before the purchase from Groshon the company was engaged in the prosecution of its mining business at and near Central City, where it established an office.

On the day of the execution of Groshon's deed, the company made to Ezra D. Fritts its three promissory notes, aggregating \$30,000, which were intended to be used and were used in part payment of the price of the property conveyed to it; and, in order to secure the payment of the notes, it executed to Thatcher, as trustee, a deed of trust upon the property, except the Clipper lode, conditioned that on default in the payment of either of the notes or the interest thereon, the trustee might sell and dispose of the said mining property. That deed of trust was duly recorded on the 26th of June, 1877.

On the 5th of January, 1878, default having occurred in the payment of the notes, the deed of trust was foreclosed under the power of sale contained in it, and on that day Thatcher executed, acknowledged and delivered his deed for all said real estate and mining property (except the Clipper lode) to Fritts. That deed was duly recorded January 7, 1878.

The defendants claimed title and possession by virtue of divers mesne conveyances, in due form, from the company and its assigns under the above deed of trust, for all of the property, excepting the Clipper lode, which has never been conveyed by it.

On the 13th of April, 1878, Groshon executed, acknowledged, and delivered his deed of quit-claim of all the real estate and mining property in the complaint described to Samuel S. Porter. That deed was delivered to Porter on the 20th of May, 1878. but

has never been recorded. The latter by his deed of quit-claim, executed May 20, 1878, conveyed to defendant Palmer. The latter deed was delivered to the grantee on the 25th of May, 1878, but it remains unrecorded. Afterward, June 28, 1879, Palmer filed in the office of the clerk and recorder of the county where the property is situated notice, according to law, of the bringing of this suit, and the object thereof.

The Comstock Mining Co., at the time of its purchase from Groshon, had not, nor has it since that time, complied or attempted to comply with sec. 10 of art. 15 of the Constitution of Colorado, nor with secs. 23 and 24 of chap. 19 of the General Laws of that State, otherwise known as secs. 260 and 261 of chap. 19 of the General Statutes of Colorado, 1883, prescribing the terms and conditions upon which foreign corporations may do business in that State.

A copy of the incorporation laws of Missouri, under which this company was organized, was, at the time of its organization, on file in the office of the Secretary of State of Colorado, but was not filed by it. Its articles of incorporation were filed in the office of the clerk and recorder for Gilpin County, where its business interests were located, on August 10, 1877, and a copy of the incorporation laws of Missouri, under which the company was organized, was also on file in the same office at and after the time the company was organized.

The defendants, during the time of their possession of the property, have held the same in good faith under the above deeds, and have paid taxes legally assessed and levied upon it, to the amount of \$400; and plaintiff has paid no taxes thereon. They have put improvements upon the property, in the way of building and repairing the dwelling house described in the complaint, of the value of \$350.

It is clear, from the facts agreed, that the object of Groshon's conveyance to the Comstock Mining Co. was to pass to that corporation whatever interest he had in the property. It is equally clear that under the trust deed to Thatcher, the sale and conveyance to Fritts, and the subsequent mesne conveyances to the defendants, the latter acquired whatever interest the Comstock Mining Co. got by Groshon's deed to it.

But it is contended that no title or interest whatever passed from Groshon, by his deed of June 16, 1877, even as between him and the company, and, consequently, it was competent for him, at his pleasure, and notwithstanding he received the consideration for which he stipulated, and even after the sale and conveyance of the property, under the deed of trust, to make to other parties a quit-claim deed that would override not only his conveyance to the

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Comstock Mining Co., but all subsequent conveyances based upon it.

This proposition is based upon certain provisions of the Constitution and laws of Colorado relating to foreign corporations.

The Constitution of that State declares that "no foreign corporation shall do any business in this State without having one or more known places of business, and an authorized agent or agents in the same, upon whom process may be served." Art. XV. § 10.

The statutory provisions, for failing to comply with which the Comstock Mining Co. is alleged to have taken nothing by Groshon's conveyance to it, are these:

"Sec. 260. Foreign corporations shall, before they are authorized or permitted to do any business in this State, make and file a certificate signed by the president and secretary of such corporation, duly acknowledged, with the Secretary of State, and in the office of the recorder of deeds of the county in which such business is carried on, designating the principal place where the business of such corporation shall be carried on in this State, and an authorized agent or agents in this State, residing at its principal place of business, upon whom process may be served; and such corporations shall be subjected to all the liabilities, restrictions and duties which are or may be imposed upon corporations of like character organized under the general laws of this State, and shall have no other or greater powers. And no foreign or domestic corporation established or maintained in any way for pecuniary profit of its stockholders or members shall purchase or hold real estate in this State, except as provided for in this act; and no corporation doing business in the State, incorporated under the laws of any other State, shall be permitted to mortgage, pledge or otherwise encumber its real or personal property situated in this State, to the injury or exclusion of any citizen, citizens or corporations of this State, who are creditors of such foreign corporation, and no mortgage by any foreign corporation, except railroad and telegraph companies, given to secure any debt created in any other State, shall take effect as against any citizen or corporation of this State until all its liabilities due to any person or corporation in this State at the time of recording such mortgage have been paid and extinguished.

"Sec. 261. Every company incorporated under the laws of any foreign state or kingdom, or of any State or Territory of the United States, beyond the limits of this State, and now or hereafter doing business within this State, shall file in the office of the Secretary of State a copy of their charter of incorporation, or, in case such company is incorporated by certificate under any general incorporation law, a copy of such certificate and of such general

incorporation law, duly certified and authenticated by the proper authority of such foreign state, kingdom, or territory." Gen. Stat. Col. 1883, c. 19.

Precisely what was meant by the words, in section 260, "except as provided for in this act," is difficult to tell, since the act does not indicate any particular mode in which a foreign corporation may acquire real estate in Colorado. But perhaps the reasonable interpretation of the statute is that a foreign corporation shall not purchase or hold real estate in Colorado, for purposes of its business, until it first acquires, in the mode prescribed by the local law, the right to do business in that State.

No question is made in this case—indeed, there can be no doubt—as to the validity of these constitutional and statutory provisions, so far, at least, as they do not directly affect foreign or interstate commerce. In *Cooper Manufacturing Co. v. Ferguson*, 113 U. S. 727, 732, this court said that "the right of the people of a State to prescribe generally by its Constitution and laws the terms upon which a foreign corporation shall be allowed to carry on its business in the State, has been settled by this court." It may be assumed, therefore, that the Comstock Mining Co., being a corporation of another State, had no right to do business in the State of Colorado until after it had one or more known places of business within its limits, and an authorized agent designated, upon whom process could be served, nor until it had made and filed in the proper office the certificate prescribed by section 260 of the statute relating to foreign corporations. It may also be assumed, for the purposes of this case, that this company violated the law of that State when it purchased the premises here in controversy without having, in the mode prescribed by the statute, of Colorado, previously designated its principal place of business in that State, and an agent upon whom process might be served.

But it does not follow that the title to the property conveyed to the Comstock Mining Co. remained in Groshon, notwithstanding his conveyance of it to that company, in due form, and for a valuable consideration.

The Constitution and laws of Colorado, it should be observed, do not prohibit foreign corporations altogether from purchasing or holding real estate within its limits. They do not declare absolutely or wholly void, as to all persons, and for every purpose, a conveyance of real estate to a foreign corporation which has not previously done what is required before it can rightfully carry on business in the State. Nor do they declare that the title to such property shall remain in the grantor, despite his conveyance. So far as we are aware, the only penalty imposed by the statutes of Colorado upon a foreign corporation carrying on business in the

R. State before acquiring the right to do so, is found in section 262 of the same chapter, which provides: "A failure to comply with the provisions of sections 23 and 24 [sections 260 and 261] of this act shall render each and every officer, agent and stockholder of any such corporation, so failing therein, jointly and severally personally liable on any and all contracts of such company made within this State during the time that such corporation is so in default." The fair implication is that, in the judgment of the legislature of Colorado, this penalty was ample to effect the object of the statutes prescribing the terms upon which foreign corporations might do business in that State. It is not for the judiciary, at the instance or for the benefit of private parties, claiming under deeds executed by the person who had previously conveyed to the corporation, according to the forms prescribed for passing title to real estate, to inflict the additional and harsh penalty of forfeiting, for the benefit of such parties, the estate thus conveyed to the corporation and by it conveyed to others." If Groshon, the grantor of the Comstock Mining Co., had himself brought this action, the injustice of his claim would be conceded. But the present plaintiff, who asserts title under a quit-claim deed from Groshon, made after the property had passed, by the sale under the deed of trust, from the mining company, cannot, in law, occupy any better position than the original grantor would have done if he had himself brought this action. If the legislature had intended to declare that no title should pass under a conveyance to a foreign corporation purchasing real estate before it acquires the right to engage in business in the State, and that such a conveyance should be an absolute nullity as between the grantor and grantee, leaving the grantor to deal with the property as if he had never sold it, that intention would have been clearly manifested. If the construction placed by the plaintiff upon the Constitution and statutes of Colorado be sound, there would be some ground to say that a foreign corporation, taking a conveyance of real estate for purposes of its business in Colorado, before it had acquired the right to do business there, would have no standing in the courts of that State for the purpose of having the estate so acquired protected against trespasses upon it. And yet the contrary has been held by the Supreme Court of Colorado in *Utey, etc., v. Clark-Gardner Mining Co.*, 4 Colorado, 369. That was an action of trespass brought by a New York corporation. The declaration in one count charged the defendants with breaking and entering upon certain claims of the Gardner lode and breaking ore, etc. The other count was *de bonis asportatis*. The defendants filed a special plea in abatement, alleging that the plaintiff was a foreign corporation, and had never complied with the above statutory pro-

visions as to filing a certificate designating its principal place of business in the State and an authorized agent, upon whom process could be served. The court, waiving any expression of opinion as to what would be its decision if the plea had been one in bar of the action, held that the prohibitions in respect to foreign corporations, while they extended to the carrying on of business before complying with the laws of the State, did not abridge the right of a foreign corporation to sue in the courts of Colorado.

The views we have expressed are supported by several adjudications in this court in cases somewhat analogous to the present one, among which are those arising under sections 5136 and 5137 of the Revised Statutes of the United States. The first of those sections authorizes national banking associations to loan money on personal security. The other section provides: "A national banking association may purchase, hold and convey real estate for the following purposes, and for no others: First, such as shall be necessary for its immediate accommodation in the transaction of its business. Second, such as shall be mortgaged to it in good faith by way of security for debts previously contracted. Third, such as shall be conveyed to it in satisfaction of debts previously contracted in the course of its dealings. Fourth, such as it shall purchase at sales under judgment, decrees, or mortgages held by the association, or shall purchase to secure debts to it. But no such association shall hold the possession of any real estate under mortgage, or the title and possession of any real estate purchased to secure any debts due to it, for a longer period than five years."

In *National Bank v. Matthews*, 98 U. S. 621, 627, the question was directly presented whether a national bank was entitled to the benefit of a deed of trust upon real estate, which, with the note described in it, was taken—not as security for, or in satisfaction of, debts previously contracted in the course of its dealings, but—for a loan made by the bank at the time the deed of trust was assigned to it. The Supreme Court of Missouri held the deed of trust to be void, in the hands of the bank, because its loan was made upon real estate security in violation of the statute. But this court, after observing that the result insisted upon did not necessarily follow, said: "The statute does not declare such a security void. It is silent upon the subject. If Congress so meant, it would have been easy to say so; and it is hardly to be believed that this would not have been done, instead of leaving the question to be settled by the uncertain result of litigation and judicial decision. Where usurious interest is contracted for, a forfeiture is prescribed and explicitly defined." Again: "Where a corporation is incompetent by its charter to take a title to real estate, a

conveyance to it is not void, but only voidable, and the sovereign alone can object. It is valid until assailed in a direct proceeding, instituted for that purpose."

In *National Bank v. Whitney*, 103 U. S. 99, 103, which involved the validity of a mortgage to a national bank to secure future advances made to the mortgagor, the right of the bank to enforce the mortgage was sustained upon the principles announced in *National Bank v. Matthews*. The court said: "Whatever objection there may be to it as security for such advances from the prohibitory provisions of the statute, the objection can only be urged by the Government." To the same effect are *Swope v. Leffingwell*, 105 U. S. 3, and *Reynolds v. Crawfordsville Bank*, 112 U. S. 405, 412.

In *Smith v. Shelley*, 12 Wall. 358, 361, which was an action of ejectment, the question was collaterally raised as to the validity of the title acquired by a banking institution, under a deed of the premises, in consideration of a certain sum paid by it to the grantor. The bank was created by an act of the territorial legislature of Nebraska, with power "to issue bills, deal in exchange, and to buy and possess property of every kind." But when that act passed, there was in force an act of Congress, which provided that "no act of the territorial legislature of any of the Territories of the United States, incorporating any bank or any institution with banking powers or privileges, hereafter to be passed, shall have any force or effect whatever, until approved and confirmed by Congress." The act of the territorial legislature incorporating the bank, above referred to, never was approved or confirmed by Congress. It was urged, as an objection to the deed made to the bank—upon which deed one of the parties relied—that it was not a competent grantee to receive title. This court said: "It is not denied that the bank was duly organized in pursuance of the provisions of an act of the legislature of the Territory of Nebraska; but it is said it had no right to transact business until the charter creating it was approved by Congress. This is so, and it could not legally exercise its powers until this approval was obtained; but this defect in its Constitution cannot be taken advantage of collaterally. No proposition is more thoroughly settled than this, and it is unnecessary to refer to authorities to support it. Conceding the bank to be guilty of usurpation, it was still a body corporate *de facto*, exercising at least one of the franchises which the legislature attempted to confer upon it; and, in such a case, the party who makes a sale of real estate to it is not in a position to question its capacity to take the title, after it has paid the consideration for the purchase. If, prior to the execution of the deed, there had been a judgment of ouster against the corporation at

the instance of the Government, the aspect of the case would be different." See also *Myers v. Croft*, 13 Wall. 291, 295; *Jones v. Guaranty & Indemnity Co.*, 101 U. S. 622, 628; *Fortier v. New Orleans Bank*, 112 U. S. 439, 451.

To the above cases may be added those holding that an alien may take by deed or devise and hold against any one but the sovereign until office found. *Cross v. De Valle*, 1 Wall. 1, 13; *Gouverneur v. Robertson*, 11 Wheat. 332; *National Bank v. Matthews*, 98 U. S. 621, 628; *Phillips v. Moore*, 100 U. S. 208. Also, those holding that the question whether a corporation, having capacity to purchase and hold real estate for certain defined purposes, or in certain quantities, has taken title to real estate for purposes not authorized by law, or in excess of the quantity permitted by its charter, concerns only the State within whose limits the property is situated. It cannot be raised collaterally by private persons unless there be something in the statute expressly or by necessary implication authorizing them to do so. *Cowell v. Springs Co.*, 100 U. S. 55, 60; *Jones v. Habersham*, 107 U. S. 174, 188.

It results from what has been said that the court erred in rendering judgment for the plaintiff for any part of the premises described in the complaint.

The judgment is reversed, with directions to enter judgment upon the agreed statement of facts for the defendants.¹

IN THE MATTER OF THE PETITION OF THE NEW
YORK & HARLEM RAILROAD CO., RESPONDENT,
v. ELBERT S. KIP AND ELIZABETH KIP,
APPELLANTS.

IN THE COURT OF APPEALS OF NEW YORK, NOVEMBER 22, 1871.

[Reported in 46 *New York Reports* 546.]

APPEAL by Elbert S. Kip and wife from an order of the General Term of the Supreme Court in the First Department, affirming an order made at Special Term, appointing commissioners to appraise lands required by the applicant, the New York & Harlem Railroad Co., for the purposes of operating its railroad. The proceeding was initiated under the authority conferred by the amendment of the General Railroad Act in 1869, upon railroad corporations, to take the property of individuals for railroad purposes.

¹ The dissenting opinion of Miller, J., has been omitted.—Ed.

The premises sought to be condemned by the proceedings consisted of a plat of ground in the city of New York, between Forty-seventh and Forty-eighth Streets and Fourth and Lexington Avenues. The property had been leased by the applicant of the present appellants in 1858 for the term of twenty-one years at an annual rent of \$5000, and has been and is now used for the purposes of the road, in connection with the transportation and delivery in New York of hay, milk, and general freight. The present application is made upon the ground that the great increase of the business of the road, in connection with the necessary changes made and being made in its depots and warehouses, renders it necessary to erect upon the plat of ground in question permanent and very expensive structures, and that such structures ought not and cannot prudently be put upon premises in which the applicant has but a short term.

The appellants objected that other property in the vicinity, equally accessible and convenient, could be had, and that so long as the applicant had a right to the present possession and use of the premises under the lease, the statute did not authorize a proceeding to condemn the reversion, or to secure the fee of the property to meet the future requirements of the company. The Supreme Court overruled the objections, sustained the application, and granted the order appointing commissioners to appraise the land, and that order is brought by appeal to this court.

E. S. Gerry for appellants.

M. Beach for respondent.

ALLEN, J. That the land and premises, the title to which the applicant seeks to acquire by these proceedings, are required for the purposes of the corporation is beyond dispute, as is also the fact that the corporation has been unable to agree for the purchase by reason of the unwillingness or inability of the owners, the present appellants, to treat for the sale of the same for railroad purposes.

The best and highest evidence of the necessities of the applicant is that since 1858 the company has been in the actual use and occupation of the land at a large annual rent and at a large expenditure for structures thereon for purposes connected with the running and operating its railroad. While courts will not allow railroad corporations to avail themselves of the statutory grant of power, to take lands *in invitum*, by taking that which they do not require for a *bona fide* purpose, sanctioned by the act of the legislature, when really required in good faith for the purposes of the act, they will not interfere to prevent the taking. *Webb v. The Manchester & Leeds R. Co.*, 4 Mylne and Craig, 116. It is not quite too late to object that the objects and pur-

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poses of railroad corporations are not public, or that the duties devolved upon them and the services rendered by them are not of a public character, and in furtherance of public interests.

The public have an interest in the use of a railroad and in the proper performance of every power within the franchise conferred upon a railroad corporation, and hence every facility needed by such corporation is for public purposes, and whatever is required to enable the corporation to perform its duty to the public is within the principle which permits a delegation of power to it. The right of eminent domain, which is but a right of the people or government to resume the possession of lands for public use, and subject to which right property is always held, may be delegated to individuals, corporations, or municipalities for like use, and that the construction and operating of a railroad is such a use as justifies a delegation of this right is now beyond question, and is not open for consideration. *In re R. & S. R. Co. v. Davis*, 43 N. Y. 137; *Beekman v. Saratoga & Schenectady R. Co.*, 3 Paige, 45. It is undoubtedly true, as claimed in behalf of the appellants, that the grant of power being in derogation of common right is not to be extended by implication, and that the act conferring the power must be strictly complied with. These principles are elementary. But statutes granting these powers are not to be construed so literally or so strictly as to defeat the evident purpose of the legislature. They are to receive a reasonably strict and guarded construction, and the powers granted will extend no farther than expressly stated, or than is necessary to accomplish the general scope and purpose of the grant. If there remains a doubt as to the extent of the power, after all reasonable intentions in its favor, the doubt should be solved adversely to the claim of power. The purposes for which lands may rightfully be condemned to the uses of a railroad company are not necessarily confined to those needful for the track, but the legislature may confer the right to take lands compulsorily for all needful purposes of the road and works proper and necessary to enable it to perform the public service authorized by its charter. The extent of the power depends upon the terms of the grant. The act under which the power is sought to be exercised by the present applicant authorizes the taking of any such estate which it shall require "for the purposes of its incorporation, or for the purpose of running or operating its road." Laws of 1869, c. 237, § 1. The language of the act is very general and comprehensive. If lands are required for any of the purposes of the incorporation, or for the purpose of operating and running the road, that is, in the proper enjoyment and exercise of the franchise conferred, and in the performance of the service to the public assumed by it, they

may be taken *in invitum*. The only limit to the power is the reasonable necessity of the corporation in the discharge of its duty to the public. The right to take lands upon which to erect a manufactory of cars or dwellings for operatives is not included in the grant. Such purposes are not legitimately and necessarily connected with the management, the running, and operating of the railroad. *Eldridge v. Smith*, 34 Vt. 484; *Brainerd v. Peck*, *id.*, 496. Neither can lands be taken for a mere subsidiary or extraordinary purpose. But passenger depots, convenient and proper places for the storing and keeping cars and locomotives when not in use, proper, secure, and convenient places having reference to the public interests to be subserved, for the receipt and delivery of freight, and for the safe and secure keeping of property between the time of its receipt and despatch, or after its arrival and discharge, and before its removal by the owner or consignee, are among the acknowledged necessities for the running and operating the railroad, to the proper prosecution of the business in the interests of the public. They may be regarded as indispensable to the accomplishment of the general purposes of the corporation and the design of the legislative grant.

The purpose and object for which these lands are required are clearly within the scope of the grant. In *The Rensselaer & Saratoga Railroad Co. v. Davis* (*supra*), the application was not for the *bona fide* purposes of the corporation, but for speculative purposes, and in fraud of the act conferring the power. The lands were not wanted for any legitimate purpose authorized by the act; and the court, in the just exercise of the power vested in it to supervise and control the discretion of corporations in the exercise of statutory powers, and following well-established precedents, by its decision prevented the appropriation of individual property to private use. *Flower v. London, Brighton & South Coast R. Co.*, 2 Drew & Sm. 330. It is claimed that there are other lands in the same vicinity equally well adapted to the use of the applicant as those sought to be acquired by these proceedings, and which possibly might be acquired by purchase from the owners. But such objections to these proceedings are untenable. The location of the buildings of the company is within the discretion of the managers, and courts cannot supervise it. The legislature has committed to the discretion of the corporation the selection of lands for its uses, and if the necessity of lands for such purposes is shown and the lands sought are suitable, the courts cannot control the exercise of the discretion, or direct which of several plats of ground shall be taken. If the taking of one plat of ground in preference to another could be shown to work great mischief, and result in great loss, which could be pre-

vented by taking another, and the proceeding to take one parcel compulsorily, in preference to another equally well adapted to the uses of the company, is from some unworthy or malicious motive, and not in the interests of the public, the court might entertain the question, and in the exercise of a sound discretion withhold its consent to the appropriation. But in this case there are good reasons, resulting from the present occupation of and the expensive improvements put upon these premises by the appellant, why they should be taken if suitable and proper for the purposes required, the owners not claiming that they will sustain any especial injury peculiar to themselves which would not be sustained by the owners of adjacent lands, if taken.

The only other question that need be considered is the objection that there is no present necessity for these proceedings, for the reason that the applicant is now the lessee of the premises for a term having several years yet unexpired, with the right to occupy them for any of the purposes of the incorporation. The evidence shows that since the taking of the lease by the applicant the business of the road has greatly changed in character, as well as increased in amount and volume; that the growth and increasing commerce of the city have made necessary great and material changes in the location of the depots, freight and car houses, and other works and structures of the company; that the protection of the city against fires, as well as the proper security and protection of property intrusted to the corporation, while legitimately in its custody in the prosecution of its authorized business, as well as to enable it to furnish to the public the reasonable and proper facilities which are demanded by the necessities of the appropriate business of the corporation, require that the present temporary and combustible structures on the lands should be removed, and larger and more permanent structures take their place, less liable to destruction by fire, and which would furnish a better and more desirable, as well as more safe and secure, deposit for goods, while necessarily in its custody, and that such improvements would cost at least \$125,000. ¹ The making of these improvements is directly in and for the public interests, and not merely a matter of convenience or profit to the corporation. The public cannot reasonably require these expensive and permanent buildings to be put upon lands of which the railroad company is not the owner, and of which it has the use for a period less than ten years, without the privilege of a renewal of the lease, or a right to purchase the premises at the expiration of the term. ² The value of the materials upon a removal of the buildings would be but trifling compared with the cost and value of the buildings themselves. The necessity is a permanent neces-

sity, and the uses are permanent, and not temporary. The right to use the property under the lease is temporary, and does not supply the permanent necessities of the company. A usufructuary right, either temporary as to its continuance, or limited in its character, does not give to the applicant the property, the land which it has a right under the statute to acquire for its purposes. Whenever the interest acquired under its lease is not such an interest as the proper running and operating its road requires, there can be no good reason why proceedings may not be taken to acquire the land in place of the term under the lease. The necessity is a present necessity, having respect to the present wants of the public, and the application is based upon the present business of the corporation and the wants of the public, and not upon any future and contingent or conjectural needs, either of the corporation or the public. The taking of the lease does not create an estoppel against this application. The application is not to condemn the rent or the right to the rent for the term. It is to acquire the land, subject to the lease, the remedy which has become necessary for the purposes of the corporation.

The order must be affirmed with costs.

All concur save RAPALLO, J., having been of counsel, not sitting.
Order affirmed.

MARY J. L. CRAWFORD *et al.* v. JOHN L. LONGSTREET
et al.

IN THE SUPREME COURT OF NEW JERSEY, JUNE TERM, 1881.

[Reported in 43 *New Jersey Law Reports* 325.]

IN trespass *quare clausum fregit*. On error to Monmouth Circuit.

Argued at February Term, 1881, before BEASLEY, Ch. J., and DEPUE, SCUDDER, and KNAPP, JJ.

Wm. H. Vredenburg for the plaintiff in error.

C. Robbins for the defendant in error.

KNAPP, J., delivered the opinion of the court. This was an action of trespass *quare clausum*, tried at the Monmouth Circuit. The facts in the case essential to its determination were not in dispute, and the court below ruled that, under the law applicable to the facts, the plaintiffs were not entitled to recover, and thereupon directed a verdict for defendants.

The writ of error brings up the exception sealed to this direction of the judge, thus presenting the body of the case for review.

The plaintiffs had title as tenants in common in fee to the

locus in quo, acquired on the 17th of April, 1879, through several mesne conveyances from Josiah Beers.

On the 9th of August, 1870, Josiah Beers, being then owner, executed, under his hand and seal, a lease of the *locus* to "The Holmdel and Keyport Turnpike Co." for the term of five years from the 1st day of April then last past, with the privilege of ten years from the beginning of said term at the same rate and terms, for the yearly rent of \$50. The lease was executed on the part of the company by its then president, but without the use of its common seal. The company went into the possession of the premises under the lease, and continued to occupy them, paying the yearly rent therefor as it became due, to the lessor and his grantees, down to the 1st of April, 1879, and then entered upon its occupancy for another year. The premises were used by the company to store carts, tools, and implements used in the work of repairing and maintaining the turnpike road and stabling its teams. The house on the premises was occupied by a servant of the company having charge of its property there.

About the 1st of October, 1879, certain persons being engaged in removing a discharged servant of the company from the premises, after disposing of his effects removed from the premises, without the authority or consent of the company, all its property and goods found thereon, and took possession in behalf of the plaintiffs. The plaintiffs adopted their acts. Shortly thereafter the defendants, as officers and agents of the company, on coming to the property, found the doors closed against them, and the parties mentioned in the house opposing their entrance. The defendants forced the entrance door, gained possession, and ejected the plaintiffs' agents from the demised premises. This act of the defendants constitutes the alleged trespass. The defense is that the plaintiffs were not lawfully in possession, and that the defendants' entry upon the lands was in virtue of the rights of the company as tenant of a term not yet ended.

The court below, in directing the verdict for the defendants, ruled that the company, whose agents the defendants were, was lawful tenant of the *locus in quo* at the time of the alleged trespass under the lease, or as tenant from year to year; that the plaintiffs were not lawfully possessed of the premises when the defendants entered; and that as respects this suit, the entry of the defendants was legally justifiable.

The correctness of these rulings is attacked on grounds which will be considered.

The demise to the company was for a principal term of five years, with the privilege to the lessee of a further term of five years. The extended term would not have expired by efflux of

time at the date of the alleged trespass. On the trial of the cause a doubt seemed to exist whether the lessee had exercised its option for the larger term. But it was established in proof, and not controverted, that the lessee had, on the expiration of the shorter period, continued in the use and occupation of the demised premises as before, paying rent to the owners of the fee yearly, after the manner and of the amount stipulated for in the lease. If this were not plenary proof of the purpose to hold for the balance of the term, it created a tenancy from year to year, if the company could hold by such tenure; and it became thus immaterial whether the option had been exercised or not, as possession under either tenancy was equally good for the purposes of defendants' defense.

The plaintiffs challenge the ruling of the court below maintaining the legality of the company's tenancy, on the ground, first, that it is not invested with the power to take or hold lands for the purposes to which these were devoted by the company, either by any express authority given by the charter, or through necessary implication arising out of the quality and objects of the grant. "That the charter does not give the power in express terms is true; but if such tenement, in view of the uses to which it was put, be necessary to carry into effect the objects which the legislature had in mind in creating the corporation, the right to so hold and employ it would pertain to the corporation as an incident to the grant. *Leggett v. Manufacturing Co.*, Saxt. 541.

"In addition to the definite powers given, the twentieth section of the charter (Pamph. L. 1859, p. 241) confers on the company all the "rights, powers, and privileges necessary to carry the objects of the act into effect." The plaintiff in error contends for a construction of the words "necessary rights, powers, and privileges," used in the act, which is entirely too narrow and rigid to give reasonable effect to the design of the legislature—namely, that it confines the corporation to such incidental privileges as are of indispensable use, and without which the purposes of the charter must have an end. It may be conceded that a house and premises in which to store tools and implements needed in the repair of the company's road, and stables in which to keep necessary teams, and a habitation for their servants and laborers, is not strictly indispensable as a means to the end of repairing and maintaining the public road as the law required it to do. But that such an arrangement was convenient, useful, and essential to the proper management of its business scarcely admits of denial.

It is not easy to find any good reason for assigning so strict and severe a limit of meaning to those terms as that claimed by the plaintiffs, and the adjudged cases do not warrant it.

In the case of *N. J. R. R. & T. Co. v. Hancock*, 6 Vroom, 537, the Court of Errors, having under consideration like phraseology in a railroad charter, held the term "necessary," as comprising within its fair and legitimate import "all such means as are suitable and proper to accomplish the end which the legislature had in view at the time of the enactment of the charter."

Effect was given to this charter, in consonance with the rule of interpretation in the case mentioned; the objection is therefore invalid.

The second ground of error is that the court below sustained the validity of the lease to the corporation, against the plaintiffs' objection that it was void because not executed under the corporate seal of the company. This contention was founded upon the ancient rule of the common law that a corporation could neither act, speak, nor whisper apart from the instrumentality of its common seal. But the rule, opposed as it was to the demands of practical business necessity, suffered at an early day, in England, important modifications; and in this country, since the decision in *Bank of Columbia v. Patterson*, 7 Cranch, 304, the doctrine has received but slight recognition, and now it may be considered as practically abrogated. In this State, in the case of *Baptist Church v. Mulford*, 3 Halst. 182, the subject received full consideration in the Supreme Court, and the authorities bearing on the subject were quite fully collated. Since the decision in that case the question has, in this State, been considered as at rest.

It may here be considered as settled law that a corporation, when acting within the scope of its powers, stands, in respect to its ability to contract, substantially upon the same footing as do natural persons. Contracts made on its behalf by authorized agents, though by parol, are express contracts, and, as in the case of individuals, the law will on ordinary grounds imply promises against it. When, in its transactions, a deed is under the law the requisite mode of contracting, its seal is necessary. A deed was not essential in the execution of this lease. *Marbury v. Johnson*, 3 Green, 117.

Execution of the lease by an authorized agent of the company was valid and effectual to create the term without the use of corporate seal. An entry upon the use and occupation of the land under a lease purporting to be made by the agent of the company, and paying rent pursuant to its terms, is sufficient to bind the corporation to the lease. The agent's authority to act may be shown as well by subsequent ratification of his acts as by proof of a previous appointment. *Taylor L. & T.*, § 128; *Hoyt v. Thompson's Ex'rs*, 19 N. Y. 218; *Brahn v. Jersey City Forge Co.*, 9 Vroom, 74.

A third point is made against the existence of a tenancy—namely, that the term created by the lease—if it be valid—had expired for want of any act of renewal at the end of the first period of five years; and that thereafter the company were in at sufferance, they having, as contended, no power as a corporation to hold as tenants from year to year.

It is assumed that, under the terms of the lease, some affirmative act of renewal on the part of the lessor was requisite to give effect to the lessee's right to the full term of ten years stipulated for in the lease. But this is not the meaning of the contract. The demise was for a term of five years, with the privilege of ten years from the beginning of the term. The privilege to occupy the premises for the full term was conferred upon the lessee.

It gave it the right at its option to have the demised premises for the full period stipulated. It was not a covenant for renewal, and no act of the lessor was requisite to so enlarge the term. And where, as in this case, a lessee continues in possession after the expiration of the first limit of time, paying the stipulated rent, he will be considered as having elected to hold the premises for the full term. *Delashman v. Berry*, 20 Mich. 293.

But to turn to the other proposition, that an incorporated company is denied the legal power to hold upon an implied contract as tenant from year to year. It is quite clear, I think, that there exists no such legal impediment. No American case is referred to, nor is any found asserting such a rule. The cases cited in its support are from the English courts. That of *Finlay v. Bristol R. W. Co.*, 7 Exch. 409, stands prominent among those upon the point, and so decides. To the same effect are several cases referred to in the opinions delivered by the court in that just mentioned. But this result is expressly based upon their theory of the law, that corporations can contract only by their common seal, and when such tenancy rests upon implied contract arising out of the circumstances of occupation and payment of rent, only those who can bind themselves by such contracts can hold by that tenure; corporations, say they, cannot contract by parol.

Under our view of the law, as already shown, private corporations are, with us, under no such restriction, having within the range of their chartered powers the same ability to contract that pertains to natural persons. The reason of the rule in the English courts has, therefore, no application here. It would, I think, be difficult to suggest any other rational ground for a rule that a corporation, having power to hold lands for a term of years, should be debarred from the advantages, or absolved from the liabilities, that arise from such a tenancy. It certainly would not be held here that a corporation, in the occupation of premises

under circumstances that would create a tenancy from year to year in a private individual, could abandon the premises after a new year had been entered upon, without being liable for the whole year's rent; or could terminate such tenancy at the end of the year without giving the prescribed notice to the landlord. The court below ruled rightly upon the tenancy of the company.

The acts of the defendants were as its agents, and they were sheltered under its rights.

The possession which the plaintiffs claimed was gained by an entry of their agents upon the possession of the company during such term, without the authority or consent of the company, and was, as against it, unlawful and a trespass.

One in the actual possession of premises may maintain trespass against any person except him who has a right of possession. But the plaintiff must show such a lawful possession as the defendant has no right to disturb. A possession may be good against a mere wrong-doer, which will give no right of action against him who is lawfully entitled to enter. *Lambert v. Stroothe*, Willes, 221; *Graham v. Peat*, 1 East, 246; *Catteris v. Cooper*, 4 Taunt. 547.

The injury of which the plaintiffs complain, and which they must prove to sustain their action, is that their rightful possession of the *locus* was wrongfully and forcibly invaded by the defendant. This, we think, they have failed to establish, but, to the contrary, it clearly appears that the defendants, representing the rights of the company, were the only lawful possessors of the premises. The court was right in taking control of the case, and in shaping the result as it did.

If the company's agents, in asserting and maintaining in its behalf this rightful possession, committed a breach of the peace, they are answerable for that to the State. If, as is asserted, they committed an assault upon any of the persons found upon the premises, for that there is legal redress. It was not committed upon the plaintiffs, or either of them, for neither of them was present; and for that wrong to others, redress does not lie with them.

One of the defendants pleaded, in justification, his entry as a constable in the execution of criminal process against persons supposed to be there, and it is objected that, as the good faith of his actions was in issue under this plea, that question should have been submitted to the jury. But he pleaded as well the general issue, and under that plea it was competent to show a right of entry in a third person, under whose authority he was acting. *Todd v. Jackson*, 2 Dutcher, 525. If he made good this defense it could not be detracted from by a finding either way upon the other issue.

Other assignments of error question the legality of the judge's ruling in the admission and rejection of testimony. They were not discussed or alluded to by counsel, and it seems unnecessary to consider them.

We think no error appears in the record, and judgment of affirmance must be entered.

LEAZURE v. HILLEGAS.

IN THE SUPREME COURT OF PENNSYLVANIA, OCTOBER TERM,
1821.

[Reported in 7 *Sergeant & Rawle* 313.]

THIS case was twice argued, first by *Tod* for the plaintiff in error, and *J. Riddle* for the defendant in error; and on the second argument, by *Tod* for the plaintiff in error and *Thompson* for the defendant in error.

TILGHMAN, Ch. J., delivered the opinion of the court.

Frederick Hillegas, the plaintiff below (who is defendant in error), claimed the land in dispute under a warrant and survey to Thomas Holt, who conveyed to George Armstrong, who conveyed to William Henry, who conveyed to the Bank of North America, who conveyed to James Ross, who conveyed to the plaintiff. On the trial of the cause several exceptions were taken to the opinion of the court on points of evidence, on which exceptions this court is now to decide.

But the great points in this cause are, the capacity of the bank to take the land conveyed by William Henry's deed, and afterward to convey the same to James Ross.¹ There is no doubt that a corporation must be governed by the charter from which it derives its existence. It can do no act nor take any estate contrary to its charter. If, therefore, it can be shown that the Bank of North America is forbidden by its charter, either to take or to convey the land contained in William Henry's deed, the plaintiff's action cannot be supported. By the third section of the act of incorporation (17th of March, 1787, 2 Sm. L. 399) "the bank is made capable" to have, hold, purchase, receive, possess, enjoy, and retain lands, rents, tenements, goods, chattels, and effects of whatsoever kind, nature or quality to the amount of \$2,000,000 and no more, and also to sell, grant, etc., the same lands, etc. Provided, nevertheless, that such lands and tenements, which the said corpo-

¹ Only so much of the opinion is given as relates to this question.—Ed.

ration are hereby enabled to purchase and hold, shall only extend to such lot and lots of ground, and convenient buildings, and improvements thereon, erected or to be erected, which they may find necessary and proper for carrying on the business of the said bank, and shall actually occupy for that purpose, and to such lands and tenements which are or may be *bona fide* mortgaged to them as securities for their debts." It is remarkable, that with regard to the holding of lands, the charter of this bank is more restricted than that of any other bank in the State, for all the others are enabled to hold not only the lands which have been *bona fide* mortgaged to them by way of security for debts, but also those "which may be conveyed to them in satisfaction of debts previously contracted in the course of their business, or purchased at sales upon judgments which shall have been obtained for such debts." This difference of restriction must have arisen from the extreme jealousy of moneyed corporations which pervaded the mind of the legislature when the Bank of North America was incorporated. It never could have been intended to place that bank on a worse footing than others, for it was the only one which risked its capital on a field altogether untried in America, and which had the merit of rendering essential service to the United States during the war of the Revolution. It would be improper, therefore, to carry the restriction, by construction, farther than the words of the law plainly import. ¶ The restriction is that the bank shall not purchase and hold. Purchasing and holding are very different things, and the consequences of each are very different. If the words had been that the bank should neither purchase nor hold, then it could have done neither one nor the other. But although purchasing and holding might have been thought dangerous, because of the power which it would have given the bank to bring too much land into mortmain, yet to purchase, subject to the statutes of mortmain, which authorized the commonwealth to appropriate the land to its own use, could be attended with no danger. ¶ This construction would satisfy the jealous policy of the legislature, preserve the community from the danger of too great a mass of real property held in mortmain, and at the same time put it in the power of the commonwealth to act toward the bank as justice might seem to require. This is a consideration of no small importance; for when the directors of the bank accepted from William Henry a conveyance of his land at a fair price, in payment of a debt *bona fide* due, it would be hard to presume that they knew they were acting in violation of their charter. But, granting that the restriction in the charter did not extend to the simple act of purchasing, it may be asked, whence did the corporation derive the right to purchase,

and what would be the situation of land purchased without a capacity of holding? The answer is, that a corporation has, from its nature, a right to purchase lands, though the charter contains no license to that purpose. And in this respect the statutes of mortmain have not altered the law, except in case of superstitious uses. But since those statutes it is necessary, in order to enable a corporation to retain lands which it has purchased, to have a license for that purpose; otherwise, in England, the next lord of the fee may enter within a year after the alienation, and if he do not, then the next immediate lord, from time to time, has half a year to enter, and for default of all the mesne lords, the king takes the land so aliened forever. That this is the law appears from the following authorities: 2 Black. Com. 268, 269; Co. Lit. 2; 6 Vin. Ab. 265; (G. pl. 2) *id.* 266, pl. 8; Jenk. Cent. 270; 3 Com. Dig. 399; (F. 10) *id.* 401; (F. 15) 1 Rol. Ab. 513; 1, 35; 10 Co. 30. But in Pennsylvania, where there are no mesne lords, the right would accrue immediately to the commonwealth. It has been objected, however, that according to the report of the judges of this court, made on the 14th December, 1808, in pursuance of an act of Assembly requiring them to make a report of the English statutes which are in force in the commonwealth, etc., it appears that all conveyances of land to a corporation, without license, are absolutely void. I will consider this objection. The judges reported the following statutes of mortmain: "7 Ed. I. (Stat. 2); 13 Ed. I. c. 32; 15 Rich. II. c. 5, and 23 Hen. VIII. c. 10; which are in part inapplicable to this country, and in part applicable, and in force. They are so far in force that all conveyances by deed or will of lands, tenements, or hereditaments, made to a body corporate, are void, unless sanctioned by charter or act of Assembly. So also are all such conveyances void, made either to an individual, or to any number of persons associated, but not incorporated, if the said conveyances are for uses or purposes of a superstitious nature, and not calculated to promote objects of charity or utility." I have quoted the words of the report, and it is evident that the judges could have no intent, nor had they power to make any addition to the statutes, or in any manner to alter them. Now, by reference to the statutes, it will appear that in all of them, except the 23 Hen. VIII. c. 10, the conveyance is not absolutely void, but the estate passes to the corporation, subject as before mentioned to the right of the several mesne lords, and in their default, of the king, to enter and hold in fee. But by the statute of 23 Hen. VIII. c. 10 (which has been determined to extend to superstitious uses only, see 2 Black. Com. 273; 1 Co. Rep. 24), uses and trusts made and contrived in favor of religious persons, or any bodies corporate, for more than twenty years, shall be utterly

void. Now, the meaning of the report of the judges is that, according to the statute cited by them, conveyances to superstitious uses are absolutely void, and conveyances to corporations, to uses not superstitious, are so far void that those corporations shall have no capacity to hold the estates for their own benefit, but subject to the right of the commonwealth, who may appropriate them to its own use at pleasure; in other words, that such conveyances have no validity for the purpose of enabling the corporation to hold in mortmain. But to support the plaintiff's title it must be shown that the corporation had power, not only to take by purchase, but to alien. In this respect, I consider a corporation in the situation of an alien, who has power to take, but not to hold. That an alien may take by purchase (though not by descent) has been settled from the earliest times. It is so laid down in *Co. Lit. 2*, and I believe has never been questioned. Neither has it been questioned that the land is subject to forfeiture, and may be seized for the king, after office found. But it has been questioned what is the right of the alien before office found for the king. Without reference to English cases, which leave the matter in doubt, we have the highest authority in our own country for saying that, until some act done by the commonwealth according to its own laws, to vest the estate in itself, it remains in the alien, who may convey it to a purchaser, but he can convey no estate which is not defeasible by the commonwealth. This principle was asserted by Judge Story, who delivered the opinion of the Supreme Court of the United States, in the case of *Fairfax's Devisee v. Hunter's Lessee*, 7 Cranch, 603; and this was the opinion of the Supreme Court of Massachusetts, in the case of *Sheafe v. O'Neil*, 1 Mass. Rep. 256, cited by Judge Story. It is reasonable in theory, and can have no ill effect in practice, that he who has a defeasible estate may convey a defeasible estate. Provided, the right of the commonwealth to defeat the estate granted by the alien remains entire, it is immaterial who holds the land until that right be prosecuted. Supposing, then, that the cases of the alien and the corporation be similar (and I see not how they can be distinguished), it follows that the deed from the Bank of North America to James Ross conveyed a fee simple defeasible by the commonwealth. The counsel for the plaintiff did, indeed, contend that this deed might be considered as a mortgage, though on its face it appears to be an absolute conveyance. But this construction cannot be supported. In order to carry the intent of the grantor into effect, a deed intended to operate as one species of conveyance may be construed to operate as another, provided it contain word sufficient. But it cannot be construed so as to destroy the intent of the parties, as would be the case by holding this deed to be a mortgage; for it

was the clear intent of both parties to make an absolute sale, and not a mortgage. When William Henry conveyed the lands mentioned in his deed, it was his intent, that in consideration thereof, the debt due from him to the bank should be extinguished, and the bank agreed to accept the conveyance in satisfaction of the debt. But supposing it to be a mortgage, the debt would be extinguished, and Henry would still remain responsible. I am clearly of opinion, therefore, that it was not a mortgage, but an absolute conveyance.

4. The fourth and last exception in this cause was to the deed from James Ross by John Anderson, his attorney, to the plaintiff. The objection was that the power of attorney was not produced, nor good reason shown for not producing it. The court heard evidence on that point, and being of opinion that there was sufficient proof of the existence of the power, and of its loss, suffered its contents to be proved by parol evidence. In matters of this kind, where the court below goes into a preliminary inquiry before it decides upon the admissibility of written evidence, it must be a very strong case which would induce this court to decide that there was error. Such a case is not presented on this record, and therefore, without criticising the parol evidence, I will only say that the fourth exception does not appear to me to be supported.

Upon the whole, I am of opinion that there was error in admitting the deed from the Bank of North America to James Ross without proof of the corporate seal, and that there is no other error in the record. The judgment is, therefore, to be reversed, and a *venire facias de novo* awarded.

Judgment reversed, and a *venire facias de novo* awarded.

HENRY AYERS AND OTHERS, APPELLANTS, v. THE SOUTH AUSTRALIAN BANKING CO., RESPONDENTS.

IN THE PRIVY COUNCIL, FEBRUARY 2, 1871.

[*Reported in Law Reports, 3 Privy Council Appeals 548.*]

Manisty, Q. C., and *C. Hutton* for the appellants.

R. Palmer, Q. C., *George Honyman*, Q. C., and *G. A. Marten* for the respondents were not called on to address their lordships.

MELLISH, L. J. This is an action of trover brought for the conversion of a large quantity of wool. The defendants are the trustees of the firm of Philip Levi & Co., in South Australia, who became insolvent according to the laws of that country; and the

action was brought by the South Australian Banking Co. to enforce what is called a preferential lien, which they had obtained, as they allege, on the wool of a large number of sheep, by an instrument made in accordance with the South Australian Act, No. 4, of 1855-56, on the 23d of August, 1866. Several objections were argued.

Another objection was taken by Mr. Manisty on the terms of the charter¹—the clause in the charter which says it shall not be lawful for the bank to make advances on merchandise. Now, unquestionably, a great many questions might be raised on the effect of that clause in the charter which may be of very great importance, but which also being of great difficulty, their lordships do not think it necessary to give any opinion upon. There may be a question as to what are the transactions which come really within the clause, and whether this particular case does come within it. There may be also a question whether, under any circumstances, the effect of violating such a provision is more than this, that the Crown may take advantage of it as a forfeiture of the charter, but the only point which it appears to their lordships is necessary to be determined in the present case is this, that whatever effect such a clause may have, it does not prevent property passing, either in goods or in lands, under a conveyance or instrument which, under the ordinary circumstances of law, would pass it. The only defense which can be set up here (there is no plea of illegality) is under the plea of not possessed, that the right of property and the right of possession never passed to the plaintiffs. Their lordships are of opinion that whatever other effect it has it cannot have the effect of preventing the property passing. If that were otherwise, the consequences might be most lamentable, because if the property never passed to them, they could not themselves convey any property to third persons. Transactions of the most honest description might be set aside. They might do what is a very common thing, make advances and take bills of exchange with the bills of lading attached. If it is to be said that the property in the goods mentioned in the bill of lading does not pass to them, then any purchaser to whom they might sell the goods under the bill of lading would get no title, and the original owner who had received the full proceeds of the goods, or a large advance upon them, might say, "Oh, the property never passed to the South Australian Bank, and, therefore, it never passed to you." Mr. Manisty admitted that he could find no authority for the proposition that any violation of such a condition of a charter would prevent the property in goods passing to the person to

¹ Only so much of the opinion is given as relates to this question. The statement of facts has been omitted.—Ed.

whom an instrument otherwise valid professed to pass it, and their lordships are of opinion that whatever other effect the violation of such a condition may have, it has not the effect of preventing the property in the goods passing, or of preventing an action of trover being maintained if there is a wrongful conversion.

On the whole, therefore, their lordships are of opinion that the judgment of the court below was right, and they will humbly advise Her Majesty that this appeal should be dismissed, with costs.

HENRY WHITE AND ANOTHER, EXECUTORS, *v.* WILLIAM J. HOWARD AND OTHERS.

IN THE SUPREME COURT OF ERRORS OF CONNECTICUT, SEPTEMBER TERM, 1871.

[*Reported in 38 Connecticut Reports 342.*]

BILL IN EQUITY by the executors of the will of William Bostwick, praying for advice in the construction of the will; brought to the Superior Court in New Haven County, and reserved for advice on facts found by a committee. The material provisions of the will were as follows:

After the payment of certain legacies, amounting in the aggregate to \$8500, including a legacy of \$1000 to the Southern Aid Society, all the residue of the testator's estate, both real and personal, was devised and bequeathed to certain trustees named, as joint tenants in fee-simple, as a trust fund to be applied for the benefit of the testator's daughter, Frances Howard Bostwick, during her life, but if the daughter should die leaving no husband or child or issue of any child surviving her, the trust fund was to be disposed of as follows: \$22,000 to certain legatees named, and then whatever remained of the trust property was to be divided among six societies—namely, the American Tract Society, the Southern Aid Society, the American and Foreign Christian Union, the American Colonization Society, the Trustees of the Board of Domestic Missions of the General Assembly of the Presbyterian Church in the United States of America, and the Board of Foreign Missions of the Presbyterian Church in the United States of America.

The will further provided that if any of the above-named six societies should not be incorporated, the estate given by the will to such society should be conveyed, transferred, and paid in fee-simple, to the person who when the estate was to be transferred

according to the provisions of the will should act as treasurer of such society, to be appropriated to the charitable purposes of said society, and under its direction.

The parties respondents were the six societies named, who claimed each one-sixth of the residue of the estate; the heirs-at-law of the testator, who insisted upon the incapacity of those societies to take, and asserted their title to the residue, and the administrator and heirs-at-law of the daughter, Frances Howard Bostwick, who claimed that the bequest to the societies failing, they, and not the heirs of William Bostwick, were entitled to the residue.

The facts as found by the committee are sufficiently stated in the opinion.

H. White and *J. S. Beach* for the petitioners.

Doolittle and *L. H. Bristol* for the heirs-at-law of the testator.

D. B. Beach for the heirs-at-law of Frances Howard Bostwick.

J. W. Edmunds, Cook, and Campbell for the American and Foreign Christian Union.

G. N. Titus and *T. Westervelt* for the American Tract Society, the American Colonization Society, the Trustees of the Board of Domestic Missions, and the Board of Foreign Missions.

A. L. Edwards and *S. E. Baldwin* for the Southern Aid Society.

FOSTER, J. This bill is brought by the executors and trustees appointed by the last will and testament of the late William Bostwick, to procure a construction of that instrument, and to remove certain doubts which it is alleged have arisen as to the validity and effect of some of its provisions. The will bears date May 23, 1860, and there are two codicils annexed to it, one dated April 1, 1861, the other August 16, 1862. The testator died on the 16th of April, 1863, and the will was admitted to probate in the district of New Haven on the 9th of June, 1863.

Some of the questions suggested for our decision involve little or no difficulty; indeed there are very few about which we have entertained serious doubts.

As the American and Foreign Christian Union Society was incorporated under and in pursuance of the provisions and requirements of the act of the legislature of the State of New York passed April 12, 1848, and the acts amendatory thereof, it is claimed that that society is incapable of taking more than one-fourth of one-sixth of the testator's estate. The law referred to provides that no person leaving a wife, or child, or parent, shall devise or bequeath to such institution or corporation (meaning any benevolent, charitable, scientific, or missionary society) more than one-fourth of his or her estate, after the payment of his or her debts, and such devise or bequest shall be valid to the extent

of one-fourth. The testator left a daughter, but this devise or bequest was given to take effect only in the event of her death without issue. That event having happened, we perceive no restraint upon the power of this society to take the specified one-sixth of the residuary estate. The object of this law, which was doubtless intended to protect parents, wives, and children to a certain extent, is not in the slightest degree frustrated by giving full effect to this provision of the will. The Supreme Court of New York, having recently had this precise question before them in this very case, decided that this society was entitled to one-sixth of the residuary estate situated in New York, and the Court of Appeals affirmed that decision. Besides, we do not regard this law as a part of the charter of the corporation, but only as a statute of that State restraining the right of corporations to take by devise within but not without the State. We treat this question more fully in considering the claim of the Tract Society.¹

*Only in
will
and*

Incorporated

The American Tract Society and the Southern Aid Society are the only societies now remaining of the six to which the residuary estate was given, whose rights under this will remain to be considered. It is asserted that the American Tract Society can take neither real nor personal property under this will. That it cannot take real, because its charter of incorporation, granted by the State of New York, does not confer the power of taking by devise; that it cannot take personal, because the charter provides that the net income of said society arising from real and personal estate shall not exceed the sum of \$10,000 annually. This limit it is claimed has been reached and exceeded, and so the capacity of the society to take property is exhausted. This society was incorporated by a special act of the legislature of the State of New York, passed May 26, 1841. The third section of its charter provides that the corporation shall possess the general powers, and be subject to the provisions contained in title 3, of c. 18 of the first part of the Revised Statutes, so far as the same are applicable and have not been repealed. The title and chapter referred to enumerate the powers of corporations, and the clause which bears directly upon this subject reads thus: "To hold, purchase, and convey such real and personal estate as the purposes of the corporation shall require, not exceeding the amount limited in its charter." This charter was amended by the legislature of New York on the 31st of March, 1866, but as this was after the death both of the testator and of his daughter, that amendment need not be particularly considered, as it cannot materially affect the question involved. Now it is manifest that this corporation has express power by its charter to hold, purchase, and convey real

¹ Only so much of the opinion is given as relates to this question.—Ed.

and personal estate, for specified purposes and to a limited amount. There is no express power to take by devise, nor is the power so to take expressly prohibited. We suppose there could be no doubt that this corporation could take by devise in New York, if the Statute of Wills of that State empowered corporations generally to take in that manner. The English Statute of Wills, passed in the time of Henry VIII., authorized every person having a sole estate in fee-simple of any manors, etc., "to give, dispose, will, or devise, to any person or persons, except to bodies politic and corporate, by his last will and testament in writing, or otherwise by any acts lawfully executed in his lifetime, all his manors, etc., at his own will and pleasure, any law, statute, custom, or other thing theretofore had, made, or used to the contrary notwithstanding." Thus corporations, by express exception in these statutes, were not enabled to take lands directly by devise in England, and the Statute of Wills of the State of New York makes the same exception. By that statute it is enacted that all persons, except idiots, persons of unsound mind, married women, and infants, may devise their real estate by a last will and testament duly executed, etc. "Such devise may be made to every person capable by law of holding real estate; but no devise to a corporation shall be valid, unless such corporation be expressly authorized by its charter, or by statute, to take by devise." 3 N. Y. Rev. Stat., 138 (5th ed). This corporation therefore, prior to the recent amendment of its charter, could not take by devise in New York, and such is the decision of their Supreme Court and Court of Appeals in this very case. And so it is earnestly contended that it cannot take by devise in Connecticut. We yield readily to the doctrine laid down in this connection in regard to corporations; indeed it is too thoroughly established to be doubted or questioned. That doctrine perhaps is nowhere better stated than in the case of *Head v. Providence Ins. Co.*, 2 Cranch, 127, by the then illustrious head of the Supreme Court of the United States, the late Chief Justice Marshall: "It (a corporation) may correctly be said to be precisely what the incorporating act has made it; to derive all its powers from that act, and to be capable of exerting its faculties only in the manner which that act authorizes." Now this corporation stands at the bar of this court claiming the right to take lands within our territory by devise. It is clothed with such powers as have been conferred by its charter. Those, a portion of them, as we have seen, are to hold, purchase, and convey real estate. It is not expressly authorized to take by devise, nor is it prohibited from so taking. Can it then take by devise? Not in New York, as we have seen. Therefore not in Connecticut, say the counsel for the heirs-at-law, for being a New York cor-

poration, and by the law of that State devoid of power to take by devise, no argument is needed to show its inability to take by devise in Connecticut. This conclusion is too hastily drawn. If the inability to take by devise arose out of a prohibitory clause in the charter, the conclusion would be legal and logical. But the inability does not so arise. There is no prohibition in the charter; the inability is created by the New York Statute of Wills, expressly excepting corporations from taking by devise. Now this corporation brings with it from New York its charter, but it does not bring with it the New York Statute of Wills and cannot bring it to be recognized as law within this jurisdiction. There is an obvious distinction between an incapacity to take created by the statute of a State, which is local, and a prohibitory clause in the charter, which everywhere cleaves to the corporation. The reasoning is fallacious, not recognizing this distinction. There being no prohibition in the charter, and the power to hold and convey real estate being expressly given, we must look to our own statutes and laws, and not to those of New York, to determine whether or not this corporation can take by devise in Connecticut.

The State of New York has partially adopted the policy of England in regard to devises to corporations, though the English statutes, usually called the statutes of mortmain, have not been re-enacted in that State. Those statutes began with *Magna Charta*, in 9 Henry III., and embrace a succession of acts down to and including 9 George II. They were intended to check the ecclesiastics of the Roman church from absorbing in perpetuity, in dead clutch, all the lands of the kingdom, and so withdrawing them from public and feudal charges. Shelford on Mortmain, 2. By the statute of 43 Eliz., c. 4, known as the Statute of Charitable Uses, lands may be devised to a corporation for a charitable use, and the Court of Chancery will support and enforce such devises. Whether a court of equity has power to execute and enforce such trusts, as charities, independent of any statute, is a question which has been much discussed, and very high authorities can be quoted both in favor and against the exercise of such a power. We think the later and better opinion to be in favor of an original and necessary jurisdiction in courts of equity as to devises in trust for charitable purposes, when the general object is sufficiently certain, and not contrary to any positive rule of law. It is unnecessary, however, to decide this question, for in this State we have no statutes of mortmain; no exception in our Statute of Wills prohibiting corporations from taking by devise; aliens, resident in this State or in any of the United States, may purchase, hold, inherit, or transmit real estate, in as full and ample a manner as native-born citizens; their wives are entitled to dower; their chil-

dren and other lineal descendants may inherit; and we have besides a statute, passed in our colonial days in 1702, in effect re-enacting the statute of 43 Elizabeth, and containing indeed more liberal and comprehensive provisions to sustain devises of this description than are contained in the 43 Elizabeth. That act provides, that "all lands, tenements, or other estates, that have been or shall be given or granted by the General Assembly, or any town or particular person, for the maintenance of the ministry of the gospel, or of schools of learning, or for the relief of the poor, or for any other public and charitable use, shall forever remain to the uses to which they have been or shall be given or granted, according to the true intent and meaning of the grantor, and to no other use whatever."

We therefore entertain no doubt that the American Tract Society can take by devise in this State. As to the other objection, that having an income greater in amount than is allowed by its charter it has exhausted its power to take, it suffices to say that no such fact is found by the very competent committee whose report is on the record. A limitation on the net income from the real and personal estate is not a limitation on a bequest or devise; and we are not satisfied that this inquiry can be legitimately made collaterally in a proceeding of this sort. Nor do we assent to the claim that the burden is on the society to show its capacity to take in this respect.//In *Ex parte Pennsylvania Iron Co.*, 7 Cow. 540, it was held that where the restraint on the right of purchase was imposed by the charter in a proviso, it was incumbent on the party objecting to the purchase to bring the case by proof within the proviso. R'

But supposing that this organization as a corporation has exhausted its capacity to take, has forfeited its charter, or that by its charter it never had power to take by devise, still it would under any of these circumstances be entitled to the rights and privileges of a voluntary association of individuals. The treasurer of the organization is well known, his name is given in the report of facts, he has for many years acted uninterruptedly in that capacity, and is still so acting. Now under this will we think he may take as trustee in trust for this association, if it is unable to take as a corporation, having exhausted its capacity to take, or if as a corporation it never had capacity to take by devise. Such is the clear and positive direction of this testator in the 13th article of this will.

The Superior Court is advised to pass a decree in this case in conformity with the rules here laid down.

In this opinion the other judges concurred.

NATIONAL BANK v. MATTHEWS.

IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM,
1878.

[Reported in 98 United States Reports 621.]

ERROR to the Supreme Court of the State of Missouri.

On the 1st of March, 1871, Hugh B. Logan and Elizabeth A. Matthews executed and delivered to Sterling Price & Co. their joint and several promissory note for the sum of \$15,000, payable to the order of that firm two years from date, with interest at the rate of ten per cent. per annum. The payment of the note was secured by a deed of trust, executed by her, of certain real estate therein described, situate in the State of Missouri.

On the 13th of the same month, the note and deed of trust were assigned to the Union National Bank of St. Louis. Price & Co. failed to pay the loan at maturity. The bank directed the trustee named in the deed of trust to sell. Said Elizabeth thereupon filed this bill in the proper State court to enjoin the sale. The bank in its answer avers that it "accepted the said note and deed of trust as security for the sum of \$15,000, then and there advanced and loaned to said Sterling Price & Co. . . . on the security of said note and deed of trust." A perpetual injunction was decreed upon the ground that the loan by the bank to Price & Co. was made upon real estate security; that it was forbidden by law; and that the deed of trust was, therefore, void. The decree was made upon the pleadings. No testimony was introduced upon either side. The bank removed the case to the Supreme Court of the State, where the decree was affirmed. The bank then sued out this writ of error.

Philip Phillips for the plaintiff in error.

J. A. Hunter, John W. Noble, and John C. Orrick for the defendant in error.

SWAYNE, J., after stating the facts, delivered the opinion of the court.

This case involves a question arising under the national banking law, which has not heretofore been passed upon by this court. We have considered it with the care due to its importance.

Our attention has been called to but a single point which requires consideration, and that is, whether the deed of trust can be enforced for the benefit of the bank.

The statutory provisions which bear upon the subject are as follows:

"Sec. 5136." Every national banking association is authorized

" to exercise by its Board of Directors or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt, by receiving deposits, by buying and selling exchange, coin and bullion, by loaning money on personal security, and by obtaining, issuing, and circulating notes according to the provisions of this title.

" Sec. 5137. A national banking association may purchase, hold, and convey real estate for the following purposes, and for no others: First, such as may be necessary for its immediate accommodation in the transaction of its business. Second, such as shall be mortgaged to it in good faith by way of security for debts previously contracted. Third, such as shall be conveyed to it in satisfaction of debts previously contracted in the course of its dealings. Fourth, such as it shall purchase at sales under judgments, decrees, or mortgages held by the association, or shall purchase to secure debts to it. But no such association shall hold the possession of any real estate under mortgage, or the title and possession of any real estate purchased to secure any debts due to it for a longer period than five years." Rev. Stat. 1909; 13 Stat. 99.

Here the bank never had any title, legal or equitable, to the real estate in question. It may acquire a title by purchasing at a sale under the deed of trust; but that has not yet occurred, and never may.

Sec. 5137 has, therefore, no direct application to the case. It is only material as throwing light upon the point to be considered in the preceding section. Except for that purpose it may be laid out of view.

Sec. 5136 does not, in terms, prohibit a loan on real estate, but the implication to that effect is clear. What is so implied is as effectual as if it were expressed. As the transaction is disclosed in the record, the loan was made upon the note as well as the deed of trust. *Non constat*, that the maker who executed the deed would not have been deemed abundantly sufficient without the further security. The deed, as a mortgage would have been, was an incident to the note, and a right to the benefit of the deed, whether mentioned or delivered or not, when the note was assigned, would have passed with the note to the transferee of the latter.

The object of the restrictions was obviously threefold. It was to keep the capital of the banks flowing in the daily channels of commerce; to deter them from embarking in hazardous real estate speculations, and to prevent the accumulation of large masses of such property in their hands, to be held, as it were, in mortmain.

The intent, not the letter, of the statute constitutes the law. A court of equity is always reluctant in the last degree to make a decree which will effect a forfeiture. The bank parted with its money in good faith. Its garments are unspotted. Under these circumstances, the defense of *ultra vires*, if it can be made, does not address itself favorably to the mind of the Chancellor. We find nothing in the record touching the deed of trust which, in our judgment, brings it within the letter or the meaning of the prohibitions relied upon by the counsel for the defendant in error.

In *The First National Bank of Fort Dodge v. Haire and Others*, 36 Iowa, 433, the bank refused to discount a note for a firm, but agreed that one of the partners might execute a note to the other, that the payee should endorse it, that the bank should discount it, and that the maker should indemnify the endorser by a bond and mortgage upon sufficient real estate executed for that purpose, with a stipulation that, in default of due payment of the note, the bond and mortgage should inure to the benefit of the bank. The arrangement was carried out. The note was not paid. The maker and endorser failed and became bankrupts. The bank filed a bill to foreclose. The same defense was set up as here. In disposing of this point the Supreme Court of the State said: "Every loan or discount by a bank is made in good faith, in reliance, by way of security, upon the real or personal property of the obligors; and unless the title by mortgage or conveyance is taken to the bank directly, for its use, the case is not within the prohibition of the statute. The fact that the title or security may inure indirectly to the security and benefit of the bank will not vitiate the transaction. Some of the cases upon quite analogous statutes go much further than this. *Silver Lake Bank v. North*, 4 J. C. R. 370."

But it is alleged by the learned counsel for the defendant in error that in the jurisprudence of Missouri a deed of trust is the same thing in effect as a direct mortgage—with respect to a party entitled to the benefit of the security—and authorities are cited in support of the proposition. The opinion of the Supreme Court of Missouri assumes that the loan was made upon real estate security within the meaning of the statute, and their judgment is founded upon that view. These things render it proper to consider the case in that aspect. But, conceding them to be as claimed, the consequence insisted upon by no means necessarily follows. The statute does not declare such a security void. It is silent upon the subject. If Congress so meant, it would have been easy to say so; and it is hardly to be believed that this would not have been done, instead of leaving the question to be settled by the uncertain result of litigation and judicial decision. Where usurious interest is contracted for, a forfeiture is prescribed and explicitly defined.

In *Harris v. Runnels*, 12 How. 79, this court said that "the statute must be examined as a whole, to find out whether or not the makers meant that a contract in contravention of it was to be void, so as not to be enforced in a court of justice." In that case, a note given for the purchase-money of slaves, taken into Mississippi contrary to a statute of the State, was held to be valid.

Where a statute imposes a penalty on an officer for solemnizing a marriage under certain circumstances, but does not declare the marriage void, the marriage is valid; but the penalty attaches to the officer who did the prohibited act. *Milford v. Worcester*, 7 Mass. 48; *Parton v. Hervey*, 1 Gray, Mass. 119; *King v. Birmingham*, 8 Barn. & Cress. 29.

Where a bank is limited by its charter to a specified rate of interest, but no penal consequence is denounced for taking more, it has been held that a contract for more is not wholly void. *The Planters' Bank v. Sharp et al.*, 12 Miss. 75; *The Grand Gulf Bank v. Archer et al.*, 16 *id.* 151; *Rock River Bank v. Sherwood*, 10 Wis. 230.

The charter of a savings institution required that its funds should be "invested in, or loaned on, public stocks or private mortgages," etc. A loan was made and a note taken, secured by a pledge of worthless bank stock. The borrower sought to enjoin the collection of the note upon the ground that the transaction was forbidden by the charter, and therefore void. The court held the borrower bound, and upon a counter-claim adjudged that he should pay the amount of the loan with interest. *Mott v. The United States Trust Co.*, 19 Barb. (N. Y.) 568.

Where a corporation is incompetent by its charter to take a title to real estate, a conveyance to it is not void, but only voidable, and the sovereign alone can object. It is valid until assailed in a direct proceeding instituted for that purpose. *Leazure v. Hillegas*, 7 Serg. & R. (Pa.) 313; *Goundie v. Northampton Water Co.*, 7 Pa. St. 233; *Runyon v. Coster*, 14 Pet. 122; *The Banks v. Poitiaux*, 3 Rand. (Va.) 136; *McIndoe v. The City of St. Louis*, 10 Mo. 577. See also *Gold Mining Co. v. National Bank*, 96 U. S. 640.

The authority first cited is elaborate and exhaustive upon the subject. So an alien, forbidden by the local law to acquire real estate, may take and hold title until office found. *Fairfax's Devisee v. Hunter's Lessee*, 7 Cranch, 604.

In *Silver Lake Bank v. North* (4 Johns. [N. Y.] Ch. 370), the bank was a Pennsylvania corporation, and had taken a mortgage upon real estate in New York. A bill of foreclosure was filed in the latter State. The answer set up as a defense "that by the act of incorporation the plaintiffs were not authorized to take a mort-

gage except to secure a debt previously contracted in the course of its dealings; and here the money was lent after the bond and mortgage were executed." The analogy of this defense to the one we are considering is too obvious to need remark. Both present exactly the same question. Chancellor Kent said: "Perhaps it would be sufficient for this case that the plaintiffs are a duly incorporated body, with authority to contract and take mortgages and judgments; and if they should pass the exact line of their power, it would rather belong to the Government of Pennsylvania to exact a forfeiture of their charter, than for this court in this collateral way to decide a question of misuser, by setting aside a just and *bona fide* contract." . . . "If the loan and mortgage were concurrent acts, and intended so to be, it was not a case within the reason and spirit of the restraining clause of the statute, which only meant to prohibit the banking company from vesting their capital in real property, and engaging in land speculations. A mortgage taken to secure a loan advanced *bona fide* as a loan, in the course and according to the usage of banking operations, is not surely within the prohibition."

It is not denied that the loan here in question was within this category. This authority, if recognized as sound, is conclusive. See also *Baird v. The Bank of Washington*, 11 Serg. & R. (Pa.) 411.

Sedgwick (Stat. and Const. Constr. 73) says: "Where it is a simple question of authority to contract, arising either on a question of regularity of organization or of power conferred by the charter, a party who has had the benefit of the agreement cannot be permitted in an action founded upon it to question its validity. It would be in the highest degree inequitable and unjust to permit a defendant to repudiate a contract, the benefit of which he retains."

What is said in the text is fully sustained by the authorities cited.

We cannot believe it was meant that stockholders, and perhaps depositors and other creditors, should be punished and the borrower rewarded, by giving success to this defense whenever the offensive fact shall occur. The impending danger of a judgment of ouster and dissolution was, we think, the check, and none other contemplated by Congress.

That has been always the punishment prescribed for the wanton violation of a charter, and it may be made to follow whenever the proper public authority shall see fit to invoke its application. A private person cannot, directly or indirectly, usurp this function of the Government.

The decree of the Supreme Court of Missouri will be reversed,

and the cause remanded with directions to dismiss the bill; and it is so ordered.

MILLER, J., dissenting. I am of opinion that the National Banking Act makes void every mortgage or other conveyance of land as a security for money loaned by the bank at the time of the transaction to whomsoever the conveyance may be made; that the bank is forbidden to accept such security, and it is void in its hands.

The contract to pay the money, and the collateral conveyance for security, are separable contracts, and so far independent that one may stand and the other fall.

In the present case, the money was loaned on the faith of the deed of trust, and that instrument is void in the hands of the bank, but the note, as evidence of the loan of money, is valid against Mrs. Matthews personally. With this latter contract the State court did not interfere. It enjoined proceedings under the deed of trust against the land, and did no more.

Its judgment in that matter ought, in my opinion, to be affirmed.

NATIONAL BANK *v.* WHITNEY.

IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM,
1880.

[Reported in 103 *United States Reports* 99.]

ERROR to the Supreme Court of the State of New York.

The facts are stated in the opinion of the court.

Theodore Bacon for the plaintiff in error.

W. Harris Day contra.

FIELD, J., delivered the opinion of the court.

It appears from the record that the defendant, Whitney, some time previously to 1871 executed to Maria Crocker a mortgage upon certain real property situated in the county of Genesee, in the State of New York, to secure an indebtedness to her; that in a suit brought for that purpose the mortgage was foreclosed and a decree entered for the sale of the premises; that such sale was had, and the amount received satisfied the debt and left a surplus of over \$3800, which was paid into court. The present controversy is between subsequent mortgagees and judgment creditors for this surplus.

On the 12th of January, 1871, Whitney executed a mortgage upon the same premises to the National Bank of Genesee, pro-

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viding in terms for the payment of \$5000, one year from its date, with interest, but declaring that it was made as collateral security for the payment of all notes which the bank held at the time against him, and for his other indebtedness then due or thereafter to become due. This mortgage was recorded on the 19th of September, 1872. It subsequently appeared from an examination of the accounts between the parties that his indebtedness at the date of the mortgage was \$3200, and that this was paid before September 16, 1872.

On this last day Whitney executed two other mortgages upon the same property, one to Homer Bostwick and the other to Edward McCormick. The one to Bostwick was executed as security for the payment of liabilities and indebtedness which already had been or might thereafter be incurred by him on account of Whitney, either by endorsement or otherwise, to an amount not exceeding \$2500. This mortgage was recorded at noon on the day of its execution. The amount of the liability subsequently incurred by Whitney to Bostwick exceeded the sum named. The mortgage to McCormick was executed as security for similar liabilities and indebtedness which might be incurred by him for Whitney, to an amount not exceeding \$1500, and was recorded at forty-five minutes past one of the day of its execution. The amount of liabilities incurred by McCormick for Whitney exceeded the sum named.

It is unnecessary to give the particulars of other subsequent encumbrances, as under no circumstances could any of the surplus be applied to their discharge. In any view that can be taken of the mortgages mentioned, the surplus in controversy will be exhausted by them.

The principal question for our determination relates to the validity of the mortgage of Whitney to the national bank, so far as it applies to future advances to him. His indebtedness existing at the execution of the mortgage has been satisfied. His indebtedness subsequently incurred amounted at the sale of the premises to \$5160. If the mortgage for the future indebtedness can be sustained as a valid instrument for that purpose, the entire surplus will be absorbed for its payment, excepting such portion as may be first payable to McCormick, by reason of the fact that he took his mortgage without notice of the one to the bank. It is contended that the mortgage to the bank; so far as it applies to future advances, is invalid, because a mortgage of that character is prohibited by the national banking law. That law, after in terms authorizing every national banking association to loan money on personal security, declares that it "may purchase, hold, and convey real estate for the following purposes, and for no others:|

First, such as may be necessary for its immediate accommodation in the transaction of its business; second, such as shall be mortgaged to it in good faith by way of security for debts previously contracted; third, such as shall be conveyed to it in satisfaction of debts previously contracted in the course of its dealings; fourth, such as it shall purchase at sales under judgments, decrees, or mortgages held by the association, or shall purchase to secure debts to it."

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The question presented is not an open one in this court. It was determined in the case of *National Bank v. Matthews* at the October Term of 1878. It there appeared that Matthews and another person had given their joint note to a mercantile company for \$15,000, secured by a deed of trust on certain real property in Missouri, executed by Matthews alone. Soon afterward the company assigned the note and deed of trust to the Union National Bank of St. Louis, to secure a loan made to it at the time. The loan was not paid at its maturity, and the bank directed the trustee to sell the premises. Matthews thereupon filed a bill to enjoin the sale, and obtained a decree for a perpetual injunction, upon the ground that the loan was made upon real security, which was forbidden by the statute. The Supreme Court of the State affirmed the decree, and the case was brought here, where the decree was reversed and the cause remanded, with directions to the court below to dismiss the bill.

In coming to this conclusion this court considered the transaction in two aspects: First, as not being within the letter of the statute, because the deed of trust was not executed to the bank; and, second, as a loan upon real-estate security.

Viewed in the first aspect, the court held that as a mortgage the deed of trust was merely an incident to the note, and a right to its benefit, whether it was delivered or not with the note, passed with the transfer of the latter. If the loan had been made upon the note alone, the benefit of the deed as a mortgage would have inured to the bank by operation of law. Of course that which the law would give independently of a direct transfer by the mortgagee the statute did not intend to defeat because such transfer was made.

Viewed in the second aspect, as a loan upon real-estate security, the court observed that, so treating it, the consequence insisted upon did not follow; that the statute did not declare such security void, but was silent on the subject; that had Congress so intended it would have been easy to say so, and it can hardly be presumed that this would not have been done, instead of leaving the question to be settled by the uncertain result of litigation and judicial decision. And after citing numerous cases where a disregard of

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statutory prohibitions has not been held to vitiate the contracts of parties, but only to authorize actions by the Government against them, the court held that the prohibitory clause of the banking law did not vitiate real-estate securities taken for loans, and that a disregard of them only laid the association open to proceedings by the Government. "The impending danger," said the court, "of a judgment of ouster and dissolution was, we think, the check, and none other, contemplated by Congress. That has been always the punishment prescribed for the wanton violation of a charter, and it may be made to follow whenever the proper public authority shall see fit to enforce its application."

The construction of the act of Congress thus given has been acted upon by the national banks throughout the country ever since it was published. It is not unreasonable to suppose that they have conducted their business and made loans to a large amount in reliance upon it, and that in many cases great injury would follow a departure from it. Judicial decisions affecting the business interests of the country should not be disturbed, except for the most cogent reasons, certainly not because of subsequent doubts as to their soundness. The prosperity of a commercial community depends, in a great degree, upon the stability of the rules by which its transactions are governed. If there should be a change, the legislature can make it with infinitely less derangement of those interests than would follow a new ruling of the court, for statutory regulations would operate only in the future.

The decision in the case cited controls the present case, and in conformity with it we must hold that the mortgage to the bank, so far as the subsequent encumbrances are concerned, is to be regarded as a valid security for the future advances to the mortgagor. Whatever objection there may be to it as security for such advances from the prohibitory provisions of statute, the objection can only be urged by the Government. *Fleckner v. United States Bank*, 8 Wheat. 338-355.

But it appears from the record that the mortgage to McCormick was taken by him without notice of the prior mortgage to the bank, which had not then been registered. He has, therefore, a right as against the bank to prior payment of the \$1500 and interest, for which amount his mortgage was a lien upon the premises.

Bostwick took his mortgage with notice of the one to the bank. He cannot, therefore, claim any of the surplus until the debt of the bank is paid. The surplus should, therefore, be first applied to McCormick's claim, and the balance to the claim of the bank.

It follows that the decree of the Supreme Court of New York

must be reversed, and the case remanded with directions to enter a decree in conformity with this opinion.

So ordered.

MILLER and HARLAN, JJ., dissented.

IN THE MATTER OF THE ESTATE OF JOHN MCGRAW,
DECEASED.

IN THE MATTER OF THE ESTATE OF JENNIE MCGRAW FISKE, DECEASED.

IN THE COURT OF APPEALS OF NEW YORK, NOVEMBER 27, 1888.

[Reported in 111 New York Reports 66.]

APPEAL from judgment of the General Term of the Supreme Court in the Fourth Judicial Department, entered upon an order made August 20, 1887, which reversed a decree of the surrogate of Tompkins County on settlement of the accounts of Douglass Boardman as surviving executor of the will of John McGraw, deceased, and as executor of the will of Jennie McGraw Fiske, deceased. Reported below, 45 Hun, 354.

John McGraw, a resident of Ithaca, died May 4, 1877, leaving his only child and heir, Jennie McGraw, who on the 14th day of July, 1880, intermarried with Willard Fiske, and died September 30, 1881, without issue, leaving her husband surviving her.

John McGraw left a last will and testament, which has been duly admitted to probate by the surrogate of Tompkins County, and of which his daughter and Douglass Boardman, and the survivor of them, were made sole executors. His daughter, Jennie McGraw Fiske, also left her last will and testament, by which she made Douglass Boardman her sole executor, and which has been duly proven and admitted to probate by the surrogate of Tompkins County. Excepting property from about \$130,000 to \$150,000 in value, which came to her by devise and bequest of her grandfather, John Southworth, the title to the estate and property, which formed the subject of disposition by her will, came through the will of her father, John McGraw.

The will of John McGraw gave \$500,000 in trust for his said daughter, and made her residuary legatee, with full power to dispose by will of all the property left by him.

The will of Mrs. Fiske directed that her estate "be converted into money, or available securities, as soon as can be done, having

in view its best interests and results." After numerous bequests, among them a bequest to Cornell University of \$50,000 in trust, to be expended, so far as necessary, in completing and perfecting the McGraw building of said University; also, to said University \$200,000 in trust, to be known as the "McGraw Library Fund," the will contained the following residuary clause: "I give, devise, and bequeath all the rest, residue and remainder of my property (if any there shall be) to Cornell University, aforesaid, to be added to the 'McGraw Library Fund' aforesaid, and subject to the trusts, purposes, uses, and conditions hereinbefore prescribed for said fund."

The amount of Jennie McGraw Fiske's estate at the time of her death, as found by the surrogate, including the trust fund created under the will of John McGraw, which the surrogate held was part of the estate of John McGraw, but which Mrs. Fiske had a right to dispose of by will, was:

	\$2,275,933.46
Legacies to other than Cornell University.....	1,121,570.00
Bequests to said University.....	\$1,154,363.46

The further material facts are stated in the opinion.

E. Countryman and *S. D. Halliday* for appellants.

Esek Cowen and *George F. Comstock* for respondents.

PECKHAM, J. The question to be decided in this case is whether Cornell University or some other parties, being the residuary legatees, or else the heirs-at-law or next of kin of John McGraw, deceased, or of Jennie McGraw Fiske, deceased, or her husband, shall have the property, or any portion of it, bequeathed to the university by the will of Mrs. Fiske. In case the university should be held not to be a competent legatee, the question as to where the property shall go is, as we understand, a matter in which the various parties to the litigation have agreed, and hence the only question we need consider is, first, in regard to the capacity of the corporation to take the legacy. If that should be decided in the affirmative, it would be necessary to discuss no other question. If, however, it should be held that the corporation had no power to take and hold more than \$3,000,000, the second question would be as to whether it was the owner and holder of such an amount at the time of the decease of Mrs. Fiske. Both of these questions are important and worthy of the most careful and deliberate consideration. The case involves a very large amount of property, and involves, also, the decision of a question as to the effect of the general statutes relating to the acquisition and holding of property by corporations of the class of this university, as

the same have been affected by the terms of the special charter granted to it.

The case has been most elaborately and ably argued by counsel on both sides, and the written briefs submitted to the court by them bear conclusive evidence of the thoroughness and extent of their researches into the English law on the subject of mortmain and its results, as well as that of our own and of the other States of the Union.

To examine and comment upon each argument advanced, and to go through the long list of cases cited in this and other States and in England, would render this opinion of immoderate length and would not probably be of any great service. We must be content to give the conclusion at which we have arrived, together with the reasons which seem to us controlling, in as short a space as it reasonably may be done.

1. Coming to a discussion of the first question, it may be assumed that a corporation, by the common law, had power to take property by devise. *Sherwood v. American Bible Society*, 4 Abb. Ct. of App. Dec. 227, 231; 1 Kyd on Corp. 74-78; Grant on Corp. 98.

Our Revised Statutes provided that every corporation, as such, has power, among other things (§ 1, subd. 4), to hold, purchase and convey such real and personal estate as the purposes of the corporation shall require, not exceeding the amount limited in its charter. By sec. 2 of the same title of the statutes the powers enumerated in sec. 1 "shall vest in every corporation that shall hereafter be created, although they may not be specified in its charter or in the act under which it shall be incorporated."

Sec. 3 provides that, in addition to the powers enumerated in the first section, and to those expressly given in its charter or in the act under which it is or shall be incorporated, no corporation shall possess or exercise any corporate powers, except such as shall be necessary to the exercise of the powers so enumerated and given. 1 R. S. 599, 600, §§ 1, 2, 3.

Under this power to hold, purchase, and convey such real and personal estate as the purposes of the corporation may require, not exceeding the amount limited in its charter, the corporation could take property by devise, for the word purchase includes all means of acquiring property not coming to one by descent or the mere act or operation of the law. The same Revised Statutes, however, in providing for the transmission of real property by will, stated that "every estate and interest in real property descendible to heirs," might be devised. "Such devise may be made to every person capable by law of holding real estate; but no devise to a corporation shall be valid unless such corporation be ex-

*common
law
power to
take
property.*

*limited
in
amount*

*no power
to use
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power*

expressly authorized by its charter or by statute to take by devise."

² R. S. 57, §§ 1, 2, 3.

There are other provisions in the Revised Statutes relating to corporations incorporated for purposes of education. It is enacted therein that "the trustees of every college to which a charter shall be granted by the State shall be a corporation." Sec. 31.

"Sec. 36. The trustees of every such college, besides the general powers and privileges of a corporation, shall have power . . .

"4. To take and hold, by gift, grant or devise, any real or personal property, the yearly income or revenue of which shall not exceed the value of twenty-five thousand dollars." 1 R. S. 460, §§ 31-37.

At the adoption of the Revised Statutes, therefore, the law in this State was that a corporation could hold, purchase, and convey such real and personal estate as the purposes of the corporation should require, not exceeding the amount limited in its charter, but it could not take any real property by devise unless it was expressly authorized by its charter or by statute to take by devise. And there was power in the trustees of a college to which a charter was granted by the State, to take and hold real or personal property by gift or devise, provided the income did not exceed \$25,000 annually. Some time subsequent to the adoption of these statutes, and in the years 1840 and 1841 (c. 318 of 1840 and c. 261 of 1841), the legislature passed acts (the latter being an amendment of the earlier one) by which trusts were authorized to be created by grants, devises and bequests of property to incorporated colleges or other literary incorporated institutions in the State, to be held in trust for specific purposes comprehended in the general objects authorized by their charters. The acts contained no limitation as to the amount or value of property which could be thus taken in trust by the corporation.

It was held, however, by this court in *Chamberlain v. Chamberlain*, 43 N. Y. 424, that these acts did not repeal or affect the general law of the State limiting and restricting the amount and value of property which could be taken and held by literary and educational corporations, and it was therein said that the general laws of the State are in harmony with its policy, which has been uniform and consistent, so far as such policy is indicated by legislation in relation to gifts in mortmain, and the powers of corporations to take and hold property. It was further said that these statutes (those of 1840 and 1841) authorized the creation of special trusts, in furtherance of the objects of the corporations named, but that such trusts could be created, and full effect given to the acts within the limits imposed by the general laws upon the power of the corporations to acquire and hold property. There

being no express repeal of the general provisions of law or repudiation of the uniform policy of the State, the intent of the legislature to do either, it was said, could not be implied.

Thus the several provisions of law relating to the property of corporations stood at the time of the granting of its charter to Cornell University by the State in 1865. By c. 585 of the laws of that year, the legislature incorporated and established the Cornell University. In the first section of the act the following language is to be found: The corporation hereby created shall have the rights and privileges necessary to the object of its creation as declared in this act, and in the performance of its duties shall be subject to the provisions and may exercise the powers enumerated and set forth in the second article of c. 15, title 1 of the Revised Statutes of the State of New York.

The second article above alluded to is entitled "Of the powers and duties of the trustees of colleges," and is to be found already referred to (*supra*) as 1 Revised Statutes, 460, §§ 31 to 37. It is subdivision 4 of sec. 36 which authorizes the trustees to take and hold real or personal property by gift or devise not exceeding the value therein stated. *cannot be held by trustee in holding a certain value*

Sec. 5 of the charter reads as follows:

"Sec. 5. The corporation hereby created may hold real and personal property not exceeding three millions of dollars in the aggregate."

These provisions in the charter, together with the statutes above alluded to, must be examined for the purpose of discovering, if possible, what was the legislative intent toward this corporation regarding property.

The learned counsel for the appellant claims at the threshold that the provisions of the Revised Statutes as to the incorporation of colleges (*supra*), with a single exception, were merely intended to apply to institutions of learning incorporated by the regents of the university of the State under the general laws of the State. He argues that the regents had power to incorporate a college by virtue of the provisions of the act (c. 82) of 1787, the provisions of which were re-enacted in 1813 and incorporated subsequently into the Revised Statutes, and at that time, and for many years thereafter, there was no other way of incorporating a college unless by a special act of the legislature. Hence, he says these provisions of law, general in their nature, applied to corporations which were incorporated by the regents, and were never supposed to apply to corporations incorporated by special act, unless expressly made applicable in the special act.

The counsel is right in his statement as to the fact when the act was passed. At that time there was no general law for the in-

corporation of colleges or other institutions of learning, other than by the regents, and when they granted a charter there can be no doubt that its provisions were affected by the act as contained in the Revised Statutes. But the language therein used (sec. 31), that the trustees of every college to which a charter shall be granted by the State shall be a corporation, is general in its nature, and it would seem to include all cases embraced within its language. That it is superfluous to apply it to the case of a corporation which becomes such by virtue of the very act which incorporates it, is not a conclusive answer. It is an argument from the point of view that it was unnecessary, but because it was unnecessary is not always, perhaps even generally, an argument against the applicability of a statute to a certain condition of things. It is alike unnecessary with regard to colleges or academies which were incorporated by the regents under the power granted them in the acts of 1787 and 1813, both of which acts expressly granted them power to incorporate colleges and academies by giving them a charter. When they did so the college or academy became a corporation by virtue of those acts which empowered the regents to incorporate it. The section (31) was, therefore, unnecessary in both cases, and yet it was adopted, and in its language it embraces all colleges to which a charter is granted by the State.

The thirty-sixth section provides that the trustees of every such college shall have power, among other things (subd. 4), "To take and hold . . . any real and personal . . . property, the yearly income," etc.

I think it plain, therefore, that the provisions contained in that title would be applicable to the Cornell University, although specially chartered by the State, unless inconsistent provisions were to be found therein. The charter, however, in so many words, makes this title applicable to the university. See sec. 1 of the charter, part of the language of which is quoted *supra*.

It is true that it states the corporation, in the performance of its duties, shall be subject to the provisions and may exercise the powers enumerated in the title mentioned, among which is the right to take and hold real and personal property. But the title itself is headed "Of the powers and duties of the trustees of colleges," and among those powers and duties is the right above mentioned. I do not think that the use of the words "in the performance of its duties" would in any wise exclude the application of this fourth subdivision of sec. 36, and we must look elsewhere for such exclusion if it is to be excluded. That it is to be excluded all admit, but the exclusion is founded upon a special provision in the charter itself which is wholly inconsistent with its

continued applicability. The subdivision confines the taking and holding, by gift, etc., of real or personal property to a yearly income not exceeding in value \$25,000, while the charter permits it to hold real and personal property to an amount not exceeding \$3,000,000 in the aggregate.

Both sides admit that this subdivision in question is not applicable—the respondents, because an inconsistent provision in the charter expunges it, while the appellant claims that even if there were no inconsistent provision in the charter, it would still be inapplicable because the statute only applies to corporations incorporated by the regents. The provisions of the charter are inconsistent, and still we must look at all the other statutes above cited for the purpose of discovering what the legislative intent is. Looking at the general statutes, we find corporations have power to purchase and hold property necessary for the purposes of their incorporation, not exceeding the amount limited in their charter, but they cannot take by devise unless expressly authorized by their charter or by statute so to take. Then the Revised Statutes prohibit corporations from possessing or exercising any corporate powers, except such as are enumerated or are expressly given to them by their charters, or such as shall be necessary to the exercise of the powers so enumerated and given. The statutes also allow the trustees of a college to take property by gift or devise not exceeding a certain annual income, and then come the acts of 1840-41, and then the charter of this university. The argument of the learned counsel for the appellant is, as I have said, based upon the theory of the utter inapplicability of the act of the Revised Statutes as to colleges; and then he claims that the acts of 1840 and 1841 bestow a capacity to take property by will not exceeding the amount limited in the charter of the corporation; and he claims also that in this case there is no limitation of the power in the charter of the university to take real or personal property to any amount, and the only limitation there is consists of a limitation upon the power of holding more than \$3,000,000, in the aggregate. He thus obtains the power to take an unlimited amount of property by virtue of one act, and a limitation is only placed upon its power to hold by another act, and that is the organic act of incorporation itself.

I do not think such an interpretation of the statutes can be sustained. I think the fifth section of the charter gives the measure of the power of the university to take as well as to hold property. The language is an authority as well as a limitation. It is an authority to hold more than the Revised Statutes permitted, but it shall not be permitted to hold more than a certain specified amount. And if there were nothing said on the subject of prop-

erty in the charter, I think the Revised Statutes as to the limitation for colleges would apply. Reading the language in the charter, it is difficult to imagine a holding without a previous taking of property, and the counsel for the appellant admits that if there were no other statute providing for a taking of property, the language of the fifth section of the charter would necessarily imply a right to take in order to hold. I do not think that his claim to derive an unlimited capacity to take by virtue of the Laws of 1840 and 1841, when construed with the other statutes and with the provisions in the charter, can be upheld as a fair exposition of the legislative intent upon the subject. The statutes of 1840 and 1841 were passed for the purpose of authorizing the creation of certain special trusts in connection with these educational institutions, which could not have been legally created prior to their passage, and their object did not in the least infringe upon the general laws of the State or its policy. As has been said, their passage did not repeal those general laws limiting the amount or value of property which corporations might take and hold. Because a special statute contained provisions upon the subject of the property of the corporation thereby incorporated, which were inconsistent with the general provisions contained in the Revised Statutes relating to the same subject, I do not think the effect was not only to render the general law inapplicable, but also to twist the provisions of the Law of 1841 in relation to the special trusts spoken of into a permission outside of and beyond the language of the charter to take property without any limitation as to amount or value. That might have been the effect if the charter had repealed those general provisions as to this corporation, and had made no other provision regarding it. Under such circumstances, the act of 1841 could have been referred to as permitting the corporation to take property by devise and in trust to an extent unlimited, but when the same language which renders the general law inapplicable also gives a power to hold property to a certain limited extent, it seems to me that such a power includes the power to take up to that sum, and limits it accordingly.

It is said that if the power to take an unlimited amount of property and to hold but a certain sum were contained in the same law, there could be no doubt upon the question of the power to take. That may be so, for in that case the legislative will would have been announced in terms which could not be misunderstood. But there is a great difference between the two cases. The question is always one of legislative intent, and the inquiry is whether the statute of 1841, providing for the creation of trusts, really applies in this instance to this university so far as an unlimited capacity

to take property is concerned. For the reasons already stated, I think it does not.

Looking for a moment outside of and beyond the statute laws of the State, and in order to strengthen his position regarding the true construction to be given that law as to the material distinction in the case at least of a corporation, between the power to take and the power to hold property, the counsel for the appellant has made a most able and learned argument. Its outlines are, in substance, as follows: A corporation at common law could take and hold property by devise. At an early stage in the history of the law of England, relating to the power of corporations to hold real property, and while the feudal system still prevailed, it was enacted that no man should alien his feud to a corporation under penalty of a forfeiture thereof to his next superior, of whom he held the land; and in default of such superior insisting upon the forfeiture, then his superior might do so, and thus on until the King, as the general superior and lord of all, was reached. But in case the forfeiture was not insisted upon, the corporation, which had taken a defeasible title to the land, could hold it as against all the world.

He therefore insists that this distinction between taking and holding strengthens his claim that the use of the word hold in the charter was intentional and for the specific purpose of permitting the corporation to take an unlimited amount of property and to hold only the amount specified. No sound reason for giving such unlimited power to take, while limiting the power to hold, can, as it seems to me, be stated. And if such were the intent, I think it would have been plainly stated in the charter instead of trusting to such a conjectural application to be given to another statute.

The counsel cites about all the writers upon the subject of corporations, and they have all adverted to this distinction, as existing in relation to the English corporations subject to the mortmain statutes, and they state that licenses to hold in mortmain were granted to such bodies, but without such licenses they took the title to the real property aliened, subject only to the right of the superior lord to enter and take the land under the power of forfeiture. The only penalty, therefore, which a corporation risked when it took lands without a license in mortmain was that of a forfeiture of the land to the next superior of the grantor, and so on up to the King; and the counsel claims that in this State, in the case of a corporation with unlimited power to take, but not to hold more than a certain amount, the penalty for holding more is that the State, representing the whole people and standing in this respect in lieu of the King (there being no mesne lords),

can forfeit the charter of the corporation and thus prevent the further holding. And assuming this to be the fact, he uses it as strengthening his argument as to the existence of this clear and material distinction between taking and holding property.

The further claim is then made that, as title to the property has vested in the corporation, which, in holding it, has become subject to the forfeiture of its charter, the heirs or next of kin of the testator have no more right to raise the question than any other third parties who have no interest therein. It is said that it is a matter for the State alone to take cognizance of, and until it does the corporation holds the property, however much it may transcend the limitation prescribed in its charter.

The counsel states accurately the law of mortmain in England and its consequences of possible forfeiture of the estate granted, and, until forfeiture, the vesting of the title in the corporation indefeasible, except by the re-entry of the person entitled to take it by reason of the forfeiture. But the circumstances under which lands are held by citizens of New York, where their tenure is so wholly different from that which prevailed in England when the early mortmain acts were enacted, render any argument in regard to those acts and their effect totally inapplicable to the case of a corporation of this State. Taking the law as it exists in our statutes, including the special provision upon the subject in the charter of the university, it seems to me that the provision therein limiting the holding of property is, as I have said, a restriction also upon the power to take in excess of the specified amount. As, at common law, a corporation could take real property in the same way as an individual, the consequence was that, in England, large landed possessions were held by religious corporations, and, by reason of alienations of real estate to them, the services due by the vassal to the lord were partially, if not totally, paralyzed, and the chief lords lost their escheats. This was a constantly growing and alarming evil. To remedy the difficulty, the first mortmain act was placed in Magna Charta, which declared all such alienations to corporations entirely void, and that the lands should revert to the lord of the fee. It was held, however, that the reversion must be accomplished by an entry, and then and from that time there was a forfeiture, the corporation having taken the title and held the property until such forfeiture by re-entry. Shelford on Mortmain, 8, 34; 1 Kyd on Corp. 81; Grant on Corp. 106.

Other statutes upon the subject were subsequently enacted, all for the purpose of preventing the great accumulation of real property in the hands of corporations, and they all provided substantially for a re-entry on the part of the next superior lord when-

ever lands had been aliened in mortmain, and, until such entry enforcing the forfeiture, the corporation held the lands. There was one law, directed against superstitious uses (23 Henry VIII., c. 10), which provided that the grant to such uses for more than twenty years was absolutely void, and the estates thus aliened would have gone to the grantor or his heirs, excepting for a provision, subsequently made, giving such estates to the King. Wilmot's Opinions, 9, 10, in *Attorney-General v. Downing*, variously reported; *Ambler*, 550-571; 1 *Dick.* 414; 3 *Ves. Jr.* 714; 5 *id.* 300; 8 *id.* 256. The mortmain statute (9 George II., c. 36) renders all devises to charitable uses void. *Shelford on Mortmain*, 118-120.

The nature of the tenure of real property at the time of the passage of the early mortmain acts in England bears no resemblance to the tenure by which a citizen of this State holds lands. Here there is no vassal and superior, but the title is absolute in the owner, and subject only to the liability to escheat. *Const. of N. Y.*, art. 1, § 13. The escheat takes place when the title to lands fails through defect of heirs. *Const. of N. Y.*, art. 1, § 11.

A devise to a corporation which is forbidden to take (or forbidden to hold, if the word, under the circumstances of the case, is construed to include a taking also) does not, therefore, give a title subject to the right of some superior to claim a forfeiture of the land; but if it be in violation of a statute, I think the devise is void and the land descends to the heir or residuary devisee.

We have not in this State re-enacted the statutes of mortmain or generally assumed them to be in force, and the only legal check to the acquisition of lands by corporations consists in those special restrictions contained in the acts by which they are incorporated, and which usually confine the capacity to purchase real estate to specified and necessary objects. 2 *Kent's Com.* 282. Of course, the restrictions contained in any general law, if applicable, must also be referred to.

There is, by reference to our laws, no such necessary and universal distinction between taking and holding property by corporations, as is seen in the laws of England relating to alienations in mortmain. Whether the legislature, when using language providing for a limitation upon holding property, meant to permit an unlimited taking, is a question of legislative intent; and I think the general inference would be, in the absence of some plain and controlling circumstance to the contrary, that the legislative body meant to limit a taking as well as a holding beyond the specified amount. As is said in the *Chamberlain Case*, this is in accordance with the policy of the State, a policy which has been recognized as existing for many years, and which the courts have concurred in approving and carrying out. I do not think the stat-

ute (Laws of 1779, c. 25, § 13) touches this case. It provided that the absolute property of all lands, etc., and all rents, franchises, debts, dues, duties, and services, escheats and forfeitures, which before the 9th of July, 1776, vested in or belonged or were due to the Crown of Great Britain, were and forever after the 9th day of July, 1776, shall be vested in the people of the State, in whom the sovereignty and seigniority thereof are and were united and vested.

The counsel for the appellant does not claim that this property was itself forfeited to the State, if the State should choose to enforce the forfeiture. His claim is, as I understand it, that if the university exceeded its limitation by holding more property than it was allowed by law to hold, a cause of forfeiture of the charter was thereby created, and that in enforcing such forfeiture, after the payment of the debts of the corporation, the rest of the property would (as he insists) probably go to the State because there would be no living claimant to it who would have any right to acquire it. A forfeiture the State may claim and may enforce at pleasure, when the occasion arises, but it is a forfeiture of the charter and not a forfeiture of the property held by the corporation. It is further claimed that this distinction between the right to take and the power to hold property is one which has been admitted and enforced in the courts of England, of this State, and of the other States of the Union for a long number of years; and that there is no reason why effect to such a distinction should not be given in this case, the result being, as is stated, that the corporation has an unlimited right to take property and also an unlimited right to hold it as against any one but the State in its capacity of sovereign. There is undoubtedly a distinction between the right to take and the power to hold property under some circumstances, the only question being whether the legislature had such distinction in mind and meant to provide for it in the case in hand. It is said that an alien has the right to take property by purchase, but he cannot hold it as against the State. That is so. He takes, however, a defeasible title, good as to all but the sovereign power, which must take it upon office found or by escheat. *Wright v. Saddler*, 20 N. Y. 320.

In such case it is not exactly an accurate description of the alien's title to simply say that he can take but cannot hold. That is a contradiction in terms. If he take, he must hold, if for but a fractional part of a second of time. The expression is but a short one for the statement that he cannot hold, as against the claim of the State, where properly made and enforced. The same expression is used in the case of a corporation under the mortmain laws, that it can take but not hold, the meaning being that it cannot

hold as against the claim for forfeiture when made by the next superior lord of the grantor of the lands. That the words lose all their meaning when wrenched from the circumstances under which they were used, and applied to corporations existing by virtue of the laws of this State, seems to me a plain proposition.

The counsel has, however, with great industry and research, cited a number of cases from our own courts and those in other States, where this distinction, he claims, has been admitted, and in cases, too, where the principles involved were similar to the case at bar (one or two being, he says, precisely like it), and where it has been held that in such cases, although the corporation has violated the law of its being, yet no one but the State could take advantage thereof.

I think that, with the exception of one case, they were all entirely different from this one, and the decisions were based upon a totally different and probably a perfectly unassailable ground.¹

But it is said that where property is given to a corporation which has power to take or hold under some circumstances, the title vests in the corporation, for otherwise the State would never obtain the right to forfeit even the charter for a violation thereof. The argument is, the corporation would answer a claim to forfeit the charter by the fact that the charter precluded it from taking such property, and, therefore, as it could not, it had not done so. I do not see the force of the argument. The charter may preclude the rightful taking of the property by the corporation, and may prevent the legal title from vesting in it, but that has nothing to do with the fact that, nevertheless, the corporation has, as a physical act, taken the property and may be insisting upon its right to keep it as matter of law. In such case can there be any doubt that the corporation has taken and is holding the property as its own and in defiance of the charter, and that it may be punished by having its charter forfeited, although the rightful owner of the property may thereafter obtain his own? The fact that he does obtain it is no answer to the other fact that the corporation had taken it, nor is it any legal answer to the claim of forfeiture of the charter, on the part of the State, that it was unsuccessful in continuing to hold the property against the charter provisions.

Although we never adopted or enacted the English statutes of mortmain, yet in this, as in other States, we have a decided mortmain policy. It is found in our statute in relation to wills, prohibiting a devise to a corporation unless specially permitted by its charter or by some statute to take property by devise.

"It is a statute of mortmain, resting on a mortmain policy as distinctly as any act of the British Parliament. . . . The ne-

¹ The citation and discussion of these cases have been omitted.—Ed.

cessity is recognized of forbidding the acquisition by will, unless the legislature, in granting the charter, and in full view of the reasons for so doing, think proper to confer the power in express terms. . . . Nor is this necessity by any means a fanciful one. It is eminently praiseworthy to give in the interest of charity and religion. But in the last hours of life exaggerated impressions of charitable or religious duty often obscure the judgment of men and subject them to undue influence and persuasion. Against these the statute is intended to guard, because it is in behalf of associations incorporated for pious and benevolent purposes that the sentiments of men in such situations are most generally appealed to. The enactment is, therefore, prohibitory and it ought to be expounded and applied in that sense." Per Comstock, Ch. J., in *Downing v. Marshall*, 23 N. Y. 366, 387.

"Judges have given the widest possible scope to statutes in restraint of the disposal of property in mortmain, and have been astute in their arguments for the application of such statutes to cases as they arose." Per Gibson, Ch. J., *Hillyard v. Miller*, 10 Penn. 326. "The courts ought not to impute an intent to the legislature not clearly expressed, in direct hostility to the traditions and policy of the past. . . . Claiming property and seeking the aid of the courts to reach it, the corporation can rely only on the warrant and authority conferred by law, and cannot claim in transgression or excess of that authority. . . . Doubtless the restriction upon corporations is a governmental regulation, and one of policy, and to be enforced by the Government; but an individual whose interests will be affected by a transgression of the rule may assert and insist upon the limitation as a restriction upon the power of the corporation to take." Per Allen, J., in *Chamberlain v. Chamberlain*, 43 N. Y. 424-439.

Under our general statutes upon the subject of the right to take or hold property by corporations, and reading them in connection with the provisions of the charter of the university, we should be astute in our arguments against the application of the mortmain statutes instead of in favor of them, if we should decide that the language of the charter did not apply as well to a taking as of a holding of property beyond the expressed limit.

There can be no doubt that it is the law, in this State at least, that if there be a prohibition against the taking of property beyond a certain amount or value, a devise or bequest to a corporation of property which will exceed the amount or value which the corporation is permitted to take, will be void for the excess. This is expressly decided in the *Chamberlain* case, and we think it was rightly decided. Nor is there any doubt that in such a case the heirs or next of kin can raise the question. This was also decided

in the same case. See also *White v. Howard*, 46 N. Y. 144. When we come to the conclusion, therefore, that this university is by law precluded (or was precluded at the time of the death of Mrs. Fiske) from taking more than the amount of property limited in its charter, we bring the case precisely within the rules laid down in the cases just cited.

The language of Beasley, Ch. J., in the case of *De Camp v. Dobbins*, 31 N. J. Eq. 690, is very appropriate here. He says: "Nor can I assent to the other proposition that if, as the contention assumes, this bequest is violative of the law if carried into effect, that none but the State can intervene. I find no warrant for such a doctrine, either in the legal principles belonging to the subject or in the adjudications. There can be no doubt that there are cases in which, where a corporation has acquired rights of property to an extent or in a manner unwarranted by its charter, no one but the public can have the right to complain. A grantor making title to a corporation might be estopped from questioning the effect of his own conveyance. So a mere stranger could not question such a corporate title. But I have not observed any decision that asserts, where a title is created by devise which vests in a corporation for its own use a larger quantity of property than the laws authorize, that the heir-at-law has no right to make objection. The authorities referred to do not lend countenance to such a doctrine." The learned judge refers to the cases of *Bogardus v. Trinity Church* and *Leazure v. Hillegas* (both cited *supra*), and continues: "These cases rest on the obvious principle that the capacity of the corporate body to become the grantee in the given case cannot be challenged by a party who does not stand in a position to raise the question. In such a position it would be true that the State alone could object to such corporate act. But such instances are to be discriminated from that other class, where the corporation claims to take and hold by devise, in contravention of law, and the heir of the devisor is the party complaining. In this latter situation the doctrine enforced in the cases does not apply. . . . I have no doubt that the heir-at-law has a standing in court to raise such a contention, and that in a court of equity he would be entitled to prevail if he could succeed in establishing the proposition on which such defense rests." The court affirmed the judgment below on the ground that the corporation was not prohibited from taking the property.

The counsel claims, however, that a devise to a corporation vests the title in it, so far as the question of capacity is concerned, whenever it would in the case of a sale for a valuable consideration. Hence he says that the cases of sales above cited are de-

cisive of this, if they be admitted as well decided. In the case of an executed sale, however, the question of *ultra vires*, as set forth in the modern cases, comes in play, and the question of a want of title in the corporation in such case would not be permitted to be raised by the grantor or his heirs, because it would be against justice and would accomplish a legal wrong. *Whitney Arms Co. v. Barlow*, 63 N. Y. 62.

The question of an executed gift without consideration by a donor, by an absolute delivery to a corporation without power to take, is also instanced, and the question is asked whether the title vests in such a case in the corporation so that the donor or his heirs could not recover it back, and if it does, the counsel asks where is the difference in the two cases. It is time enough to decide such a case when it arises. But it seems to me there is a decided difference. In the one case the gift is made *inter vivos* by the absolute owner, and it is made effectual as to him by a delivery. In such case it would seem that he stands in no position to ask the aid of the court to get him out of a situation into which he voluntarily entered with his eyes open, and the court might well say to him that he stood in no position to attack the right of his donee to property which he freely and absolutely gave it. As to his heirs it could be said that their ancestor had made a disposition of property which was absolutely his own in his lifetime, and in such a way that he could not question its validity, and that as he could not, they succeeding only to his rights, were alike disabled.

In the case of a devise, however, the case is essentially different. The will does not take effect until the testator's death, and then, if his property is not legally devised or bequeathed, no title vests for a single moment in the devisee or legatee, but it vests instantly in the heir or next of kin; and the corporation claiming under the will asks the aid of the law to give the property to it, and in so doing it must show the authority it has to take. And if there were only a prohibition in words against holding the property, would the law not be doing a vain thing in handing it over to a corporation which by the very fact of holding would render itself liable to have its charter forfeited on that account? Would not the prohibition against holding be properly and necessarily construed as a prohibition against taking also?

Is not this an argument against the right of the corporation to take, if by holding it is thus rendered liable to such a penalty? And is it not an argument in favor of the construction of the language in the charter that the limitation upon the power to hold property is, under all the circumstances, a limitation upon the power to take any more than it can legally and properly hold?

One more statement must be noticed. It is said that as the

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legislature, subsequently to the death of Mrs. Fiske, passed an act which took away any limitation on the power of the university to hold property, this action of the legislative department of the Government throws a strong light upon what is the policy of the State regarding institutions of learning, and, in the view of appellant's counsel, waives the right which might have existed on the part of the State to claim a forfeiture of the charter of the corporation. But the policy of the State in relation to what may be called its mortmain laws is to be gathered from its statutes of general application on that subject, and cannot be said to be altered by the passage of special acts regarding particular corporations.

Nor do I think the counsel for appellant shows any change in the general policy of the State by referring to the acts of 1840 and 1841, already cited, as indicating a purpose to open the door to an unlimited accumulation of property by educational institutions in general. Those acts, as has been said, did not enlarge the capacity of corporations to take property more than they could take under the general laws. The act of 1864, as to union and high schools, by which the board of education has power to take and hold property for educational purposes, and where permission was given to bequeath property to the State or to the superintendent of public instruction for the support or benefit of common schools, or to any county or district school commissioner, for such support, does not betray any change in the policy of the State upon this subject. The bequests spoken of are to the political subdivisions of the State or to the State itself as a corporation, but in its political capacity, and the property remains to be administered by the State officials or the officers of such political subdivisions, for the purposes of education in the common or high schools which the people are taxed to support. This is an entirely different thing from gifts to what may be termed a private educational establishment. Our courts have been quite unanimous in their opinions as to what the policy of the State was and is on this matter; and the extracts I have made regarding it, from the opinions of two very eminent former judges of this court, could be added to very largely by citing opinions of other judges in our own State, but it is not necessary.

However perfect may be the waiver in the act alluded to, of the right of the State to forfeit the charter of this university on account of any alleged violation thereof, such act can, of course, have no possible effect upon rights of property which vested at the death of Mrs. Fiske and before the passage of the act in question. *White v. Howard*, 46 N. Y. 144.

The counsel asks what is to be done in regard to the real prop-

erty in other States, if we hold this corporation has no power to take any more property? It is said the surrogate has found, as a fact, that the university had legal capacity to take and did take by devise all the real property the title to which was in Mrs. Fiske at the time of her death, in those States. He says the title to real estate is governed by the laws of the States where the real property is situated. And that in the States in question it is held that a corporation can take under such circumstances as this case. This will devise no real estate to Cornell University.

It gives to the university \$40,000, in trust, for the erection and furnishing and support and maintenance of a hospital; \$50,000, in trust, for completing and perfecting the McGraw building; \$200,000, in trust, for the McGraw library fund, and it gives and devises the residue of the property of the testatrix, if any, to be added to the last-mentioned fund. It then directs that the estate of the testatrix shall be converted into money or available securities by her executor as soon as it can be done, having in view the best interests of the estate. This direction to convert operated as an equitable conversion of the estate of the testatrix into money or available securities, and hence no real estate in other States has been devised by her to the university. It is needless to inquire what would have been the rule in case real estate in other States had been specifically devised to the university, while this court should at the same time decide that it held property up to its charter limit, and that it had no capacity to take or hold any more real or personal property than the amount specified in its charter.

Upon a review of the whole question as to the proper construction of the legislation, general and special, affecting this university, I am of the opinion that it had no power to take or hold any more real and personal property than \$3,000,000 in the aggregate.

2. Coming to the conclusion I have on the first branch of the case, it becomes necessary to examine the second and only remaining question, viz.: Does this property, if taken and held by the university, exceed the amount which by law it can hold?¹

Under such circumstances the university could not take the various legacies bequeathed to it by her will.

The judgment of the General Term should therefore be affirmed, with costs.

All concur, except FINCH, J., taking no part.

Judgment affirmed.

¹ So much of the opinion as relates to this question has been omitted.—Ed.

CASE v. KELLY.

IN THE SUPREME COURT OF THE UNITED STATES, JANUARY 6,
1890.

[Reported in 133 United States Reports 21.]

THE case, as stated by the court, was as follows:

The Green Bay & Minnesota Railroad Co. being in the hands of a receiver, namely, Timothy Case, in the Circuit Court of the United States for the Eastern District of Wisconsin, in a suit by the Farmers' Loan and Trust Co., to foreclose a mortgage on said railroad, said receiver was directed by the court to take possession of all the property, real and personal, of said company, namely, its road-bed, lands, right of way, and all its other property and rights whatsoever, with authority to bring suits in the name of the railroad company as he should be advised by counsel to be necessary. Under this order Mr. Case, as receiver, brought the present suit, stating that he sues in behalf of said railroad company, and as receiver, the defendants, David M. Kelly, Henry Ketchum, and George Hiles and the Arcadia Mineral Spring Co., a corporation created by the laws of the State of Wisconsin.

The allegations of the bill are that the defendants, Kelly, Ketchum, and Hiles, who were officers of the railroad company during its period of construction, had procured numerous donations of land from citizens who were interested in the construction of the road, along its line, intended to be for the use and benefit of the railroad company, and to assist it in such construction. The fundamental allegation of the bill is that these defendants, representing to the persons who made the donations that they were officers of the road, and soliciting these grants for the benefit of the road, took the conveyances to themselves individually; that they did this in a fraudulent manner by making the grantors in the conveyances believe that they, as the officers of the company, could receive the conveyances for the benefit of the road; and that either the grantors did not really know to whom the conveyances were made, or were induced to believe that when made the grantees held the lands as a trust for the benefit of the road. These defendants not recognizing this trust, and the conveyances on their faces being merely conveyances to the individuals, either separately or collectively, to wit, to Ketchum, Kelly, and Hiles, who now refuse to convey to the company or to admit its right to the lands, this suit is brought to have a declaration of the trust made by the court and a decree ordering conveyances by the defendants of the land to the corporation.

It is further alleged that the mortgage in process of foreclosure in the court under which Case is acting as receiver covered all the lands of the corporation, and would cover these lands if the title of the corporation in them was established.

The defendants, Kelly, Ketchum, and Hiles, filed answers, in which they denied all fraud or deception, denied that they held the lands in trust for the railroad company, and denied the right of plaintiff to any relief. A decree for want of an answer was taken *pro confesso* against the Arcadia Mineral Spring Co.; replications were filed to the answers, the case was put at issue as regards the three principal defendants, and an immense mass of testimony, documentary and otherwise, was taken.

The Circuit Court on the hearing was of opinion that the conveyances made by various persons to Kelly and Ketchum and Hiles of the lands described in the bill were made by the grantors and received by the defendants as contributions to the railroad company to aid in the construction of its road; and that if the railroad company had authority by law to receive such grants and to hold such real estate, it would be entitled to the relief sought in the bill in this case. But being also of opinion that, by the laws of Wisconsin, and under its charter, it could only receive and hold lands for the defined purposes of the road, it held that only such lands as were necessary and proper for the immediate use of the road could be recovered in this suit. Case v. Kelly, 13 Am. and Eng. Railroad Cas. 70. It therefore entered the following interlocutory decree:

"This day came the parties, by their counsel, and, on consideration of the pleadings and proofs in this cause and the arguments of counsel thereon, it is ordered, adjudged, and decreed by the court that the complainant is entitled to recover from the defendants the title and possession of all such lands mentioned in the bill of complaint as are required by the railroad company for right of way, depot buildings, and other necessary railroad purposes, as described and limited in the charter of the company, and that the bill of complaint as to all other portions of the lands described therein be dismissed.

"For the purpose of ascertaining what lands are required for right of way, depot grounds, and other railroad purposes, as above stated, and also the extent and value of any improvements made by defendants, this cause is referred to Hon. James H. Howe, as special master of this court, who will take such additional proof as either party may offer upon reasonable notice, the evidence to close by the first day of October next, and the report of the master to be filed herein by the 20th day of October next. The master will accompany his report with such reasons as he may deem

proper in support of the conclusions reached by him. For that purpose he may visit the premises and report the result of his personal examination."

The master made his report, accompanied by the testimony, to which exceptions were taken both by Case, the receiver, and by the defendants, Hiles and Kelly, which exceptions were overruled by the court, and a final decree entered. From this the present appeal is taken.

That decree, after specifying certain pieces of land which the court considered as necessary and proper to the road for its use in the way of track, right of way, depots, and other similar, proper, and necessary uses, ordered the conveyance of these pieces of land by Kelly and by Ketchum and by Hiles and by the Arcadia Mineral Spring Co. to the railroad company. It also directed a master to ascertain and report the value of certain improvements made by Hiles upon a portion of this property, and report the same to the court, for which Hiles was to be paid in case complainant should elect to take such improvements.

Walter C. Larned, with whom was *Herbert M. Turner* on the brief, for appellant.

George H. Noyes for appellee.

MILLER, J., after stating the case, delivered the opinion of the court.

The principal question suggested by this appeal is whether the complainant, as representing the railroad company, can maintain a suit for these lands; that is to say, whether the company was endowed by the legislature of Wisconsin with a capacity to receive an indefinite quantity of lands, with no limitation upon their use, or upon their sale, or whether they were limited to the lands necessary to such uses as were appropriate to the operations of a railroad.

It is not pretended that there is any general statute of the State of Wisconsin which authorizes either this company or any other corporation to purchase and hold lands indefinitely, as an individual could do, without regard to the uses to be made of such real estate. The charter of the company, approved April 12, 1866, Private Laws Wis., 1866, c. 540, p. 1331, authorizes it to acquire real estate, namely, the fee simple in lands, tenements, and easements, for their legitimate use for railroad purposes. It is thus authorized to take lands one hundred feet in width for right of way, and also such as is needed for depot buildings, stopping-stages, station-houses, freight-houses, warehouses, engine-houses, machine-shops, factories, and for purposes connected with the use and management of the railroad. This enumeration of the purposes for which the corporation could acquire title to real estate

must necessarily be held exclusive of all other purposes, and, as the court said at the time of making its interlocutory decree, "It was not authorized by its charter to take lands for speculative or farming purposes."

It must be held, therefore, that there was no authority under the laws of Wisconsin for this corporation to receive an indefinite quantity of lands, whether by purchase or gift, to be converted into money or held for any other purposes than those mentioned in its act of incorporation.

To this view of the subject counsel urges several objections. The first of these which we will notice is that the charter of the corporation is a private act of which the court cannot take judicial notice, and that as it was not pleaded nor offered in evidence, nor otherwise brought to the attention of the court, it could not be the foundation of its judgment. To this there are two sufficient answers. The first of which is that if the statute creating this corporation gave it no power to receive and hold lands in the manner we have mentioned, then it had no such power by virtue of any law of the State of Wisconsin; for a corporation, in order to be entitled to buy and sell, to receive and hold, the title to real estate, must have some statutory authority of the State in which such lands lie to enable it to do so, and the absence of such provision in the law of its incorporation does not create any general statute which authorizes any such right.

Another answer is that in the charter of the railroad company itself, Laws of Wisconsin of 1866, c. 540, sec. 14, it is expressly enacted that "this act is hereby declared to be a public act, and shall take effect and be in force from and after its passage and publication." To this it is replied by counsel for appellant that the statute of Wisconsin cannot make that a public law which in its essential nature is a private law. However this may be, we do not doubt the authority of the legislature of a State to enact that after the passage and publication of one of its statutes the courts of the State shall be bound to take judicial notice of it without its being pleaded or proven before them. This rule, thus prescribed for the government of the courts of the States, must be binding in proceedings in federal courts in the same State. Indeed, the distinction between public and private acts has become very artificial and shadowy since legislative bodies have adopted the principle of publishing in printed form all statutes which they pass. Some of the States keep up the distinction by making a difference in the manner in which public and private acts shall be published, and in such cases this difference is to be observed and may become of some consequence, but the power of the legislature to declare in any case that after the passage and publication of any of its

laws they shall be judicially noticed as public acts cannot, we think, be doubted.

It is next objected to the principle adopted by the court that the limitation upon the power of the corporation to receive land is one which concerns the State alone, and the title to such lands in a corporation can only be defeated by a proceeding in the nature of a *quo warranto* on behalf of the State. The case of *National Bank v. Matthews*, 98 U. S. 621, is strenuously relied on to support this view. We need not stop here to inquire whether this company can hold title to lands, which it is impliedly forbidden to do by its charter, because the case before us is not one in which the title to the lands in question has ever been vested in the railroad company, or attempted to be so vested. The railroad company is plaintiff in this action, and is seeking to obtain the title to such lands. It has no authority by the statute to receive such title and to own such lands, and the question here is not whether the courts would deprive it of such lands if they had been conveyed to it, but whether they will aid it to violate the law and obtain a title which it has no power to hold. We think the questions are very different ones, and that while a court might hesitate to declare the title to lands received already, and in the possession and ownership of the company, void on the principle that they had no authority to take such lands, it is very clear that it will not make itself the active agent in behalf of the company in violating the law and enabling the company to do that which the law forbids.

Another alleged error in the decree of the court relates to that part of it which authorizes Hiles to recover the value of his improvements if the corporation chooses to take the improvements. We do not think this objection sufficient to reverse the decree. In the first place, the right of the plaintiff to have this land is not based so much upon the ground of the defendants having purchased it for the benefit of the road as upon the offer of counsel of Hiles to convey it in case he were paid for the improvements. But if we suppose that Hiles held this land in trust for the benefit of the plaintiffs, and is willing to acknowledge that trust, there is no reason why, in a court of equity, when the complainant asserts his right to the land and claims to recover both the title and possession from his trustee, he should not pay the value of the improvements which that trustee has placed upon it. It is further to be observed that the option is given to complainant to take these improvements with the land or to reject the improvements and take the land without them, in which latter case he is merely required to give the owners of the improvements access to the land for the purpose of removing them. If he desires the improve-

ments, he can keep them by paying for them. Hiles paid for the land when he got the title, and we see nothing unjust or inequitable in his receiving compensation for improvements made in good faith upon the land which he is now willing to convey to the company if the company chooses to take them at their appraised value.

We are urged to consider that if this decree is affirmed dismissing the bill of the railroad company, the defendants will be left in the possession of property fraudulently acquired, of considerable value, for which they gave no consideration. The answer to this is that such question cannot be raised by the plaintiff in this case, because having no right to take the property, it is not injured by a decree of the court which fails to grant such right. The other questions must be between the defendants in this case and those from whom they took deeds of conveyance, or such other parties, public or private, as may show that they have an interest in the controversy.

The decree of the Circuit Court is affirmed.

FULLER, Ch. J., did not hear this case and took no part in its decision.

IRA K. FARRINGTON AND OTHERS v. WILLIAM L. PUTNAM AND ANOTHER, EXECUTORS, AND OTHERS.

IN THE SUPREME JUDICIAL COURT OF MAINE, JUNE 4, 1894.

[*Reported in 90 Maine Reports 405.*]

IN EQUITY. On exceptions and appeal.

This was a bill in equity, brought by and in behalf of the several heirs at law of Ira P. Farrington, late of Portland, deceased, against the executors of said Farrington's estate and the Maine Eye and Ear Infirmary, of said Portland, such of said heirs at law as were not made plaintiffs in the bill being joined as defendants therein. Demurrers were filed by the executors and by the Maine Eye and Ear Infirmary, and the cause came on to be heard in the court below, where the demurrers were sustained and the plaintiffs filed exceptions. The presiding justice made a decree dismissing the plaintiff's bill, and from this decree an appeal was taken to this court.

The bill in equity, with its exhibits, the demurrers both of the executors, and of the Maine Eye and Ear Infirmary, and the opinion and rulings of the presiding justice, and the decree by said justice were all made a part of the bill of exceptions.

The case is stated in the opinion.

Orville D. Baker and *Clarence Hale* for plaintiffs.

J. W. Symonds, *D. W. Snow* and *C. S. Cook*; *C. L. Hutchinson*; *C. F. Libby*, *F. W. Robinson* and *Levi Turner*; and *Edward Woodman* for defendants.

PETERS, Ch. J.; WALTON, EMERY, FOSTER, WHITEHOUSE, WISWELL, JJ., sitting.

PETERS, Ch. J. Ira P. Farrington, the testator, whose will is called in question by this bill in equity, died at his home in Portland, December 17, 1894, leaving a will dated July 9, 1891, and a codicil dated January 4, 1893. The will was probated in January, 1895, in the probate court below and approved by this court in the next April afterward. The will, after a most generous provision for his widow, and numerous bequests to his relatives, besides several large bequests to certain local charities other than those to be herein named, contains the following residuary clause: "Fifth. All the rest and residue of estate, real and personal, or mixed, wherever situate, which I may own at my decease, or which I may then have the right to dispose by will, including all and any of the foregoing legacies, devises and other provisions which may in whole or in part lapse or for any reason fail, I give the Maine Eye and Ear Infirmary in the city of Portland, incorporated according to the statutes of Maine, the Maine General Hospital and the Portland Public Library, share and share alike, upon trusts, nevertheless, as follows:

"The one-third given said Eye and Ear Infirmary shall be maintained as a separate fund, designated as 'The Farrington Fund,' held, invested, reinvested, and the net income thereof applied forever annually, or oftener, to the charitable purposes of the corporation."¹

The codicil is as follows:

"I hereby republish and reaffirm said will except as herein modified.

"The gift of the one-third part of the rest and residue of my estate to the Maine General Hospital by the fifth clause of said will and all gifts and devises in any part of said will to said Maine General Hospital, I hereby revoke; and I hereby give, devise and bequeath all the same one-third and all other said gifts and devises, to the Maine Eye and Ear Infirmary, to hold to the use of it and its successors and assigns forever; the same to be in addition to, and not to affect or change, the gifts and devises to said Maine Eye and Ear Infirmary in said will contained. I double the gift of \$20,000 to the Home for Aged Men of Portland."

¹ Only so much of this clause is given as relates to the infirmary. The clause relating to the appointment of executors has also been omitted.—Ed.

The Eye and Ear Infirmary is a charitable association organized under the general statute which authorizes the formation of such corporations. R. S., c. 55, § 1. Numerous kinds and classes of persons and associations are permitted by this section to be organized into corporations, including all social, military, literary, scientific, temperance, moral, musical, agricultural, and many other societies and organizations. Section four of the chapter prescribes as follows: "Such corporations may take and hold by purchase, gift, devise or bequest, personal or real estate, in all not exceeding \$100,000 in value, owned at any one time, and may use and dispose thereof only for the purposes for which the corporation was organized." The constitution of the infirmary, a public record, declares the purpose of the institution as follows: "The object of the corporation shall be the establishment and maintenance of an infirmary in Portland, Maine, where a daily clinic may be held for the treatment, free of charge, of poor persons throughout the State, suffering from diseases of the eye and ear."

The bill alleges that the infirmary had at the death of the testator property to the full amount of \$100,000 in value, and that any additional amounts to be received through this will would be in excess of the limit allowed by its charter and in disregard of the statutes of the State; and so it further alleges "that the said Maine Eye and Ear Infirmary is incompetent to receive and incapable of holding any property beyond the amount which it now possesses, and that the bequests and devises made to it under item fifth of the said will and under the codicil to said will of said Ira P. Farrington are invalid and void, and revert to the heirs of Ira P. Farrington." The bill includes the infirmary and the executors as respondents, the prayer of the same being that the parties be enjoined, the one against paying over, and the other against receiving the devises and bequests in execution of the intention of the testator.

Both of these respondents, the executors and the corporation, filed general demurrers to the bill, which were sustained by the justice before whom the case was heard below, and the case comes to us on exceptions and a final decree in favor of the respondents. Strout, J., of this court, by whom the issues were decided, filed a written judgment in the case.¹

The question on the first branch of the case, therefore, is whether these devises and bequests are absolutely void as the complainants contend, or whether they are merely voidable according to the view of the question taken by the respondents. After very much examination of the authorities *pro* and *con*, and careful

¹ This judgment has been omitted.—ED.

consideration of the principles which affect the respective positions of the parties, we feel forced to the conclusion that the position advocated by the complainants ought not to be sustained. We feel very much impressed with the theory, stated in many of the cases, that a charter is a contract between the State and the corporation; and that for any misuse or abuse of its privileges or powers the corporation is amenable to the State only, no individual having anything to do with the question. As applicable to the present case, the principle is that, if the infirmity, by accepting these bequests and devises, increases its property ever so much in excess of the amount in value which the statute allows it to possess, it would be a transgression of the law which the State can prosecute or not as it pleases, and the heirs of the testator have no interest therein. As long as the State does not interfere for the violation, it waives it and permits the infirmity to retain the property.

The general statute under which this infirmity was organized is not expressly prohibitory, but rather regulative and directory. No penalties are attached and none intended more than a possible forfeiture of the excessive property received, or of the charter, or of one or both. This interpretation of the statute cannot by any possibility be harmful to the community, as the State can make it as stringent as it pleases at any time. But thus far the State has had no motive either to amend the statute or to enforce forfeitures for violation of its provisions. And in one section of the chapter relating to general organizations the legislature allows devises, bequests and gifts to towns for the establishment or increase of public libraries, without imposing any limitation whatever. R. S., c. 55, § 10. There cannot be an objection that such absorption of property excludes capital from taxation, because that is a matter wholly within the control of the legislature.

An over-strict construction of the law and of the rights of parties under the law in the case before us is neither expedient nor reasonable. Here is an institution, and the only one of the kind in the State, and virtually a State charitable institution of the most beneficent and humane kind, seeking money for supporting its very life and existence, and to enable it to render assistance free of charge to the poor of the State suffering from diseases of the eye and ear. This testator, who had been always a director in the institution and finally its president, knowing and fully appreciating its condition and necessities, after making provisions for other local charities, and giving to his next of kin preferred bequests according to his own judgment as to what they should have out of his estate, made, not while in the extremities of sickness, but nearly five years before his death, these legacies and devises for

the use of the innrmay. Presumably he and those whose assistance he obtained to aid him in executing his purposes never dreamed that there was any obstacle in the way of his giving or the infirmay receiving the bounties which he so strongly desired to be charitably expended. And now what a spectacle is presented if equity be successfully invoked to take advantage of this accident or mistake; equity, whose boasted vocation is to relieve against accident and mistake, in order to wrest from this institution these donations for the benefit of distant relatives and heirs! What a public misfortune it would have been, if on account of the limited amount of capital it is by its charter privileged to hold, it had turned out that our oldest college in the State was prevented from receiving the munificent bequests lately tendered to it by deceased citizens of the States of California and New York, such donations not having as yet been actually received, and the State itself powerless to allow the college to take the gifts merely on account of such limitation!

It will be noticed that most of the authorities, on which the complainants rely, concede that the rule which we would apply to devises is at all events applicable to gifts by deed, the argument being that in such a case as this a deed would be valid and a devise void. It seems inconsistent that such potential consequences should attach to the mere form of transmitting the property. We do not appreciate the justice of saying that a deed of property delivered by a donor on the day of his death to a corporation would be good, and a devise of the same property made on the same day would be bad. But the argument by the complainants is that, in the one case, the transaction is executed, and in the other case, that it cannot be considered as executed without a resort to the forms and assistance of the courts. We think the whole thing involves a distinction without a difference, a formal but not substantial distinction. Each mode of transfer needs the protection and aid of the law to render it operative. In the first place, the will must be probated, it is said. But on that question no inquiry can be instituted to see if there be any impropriety in any particular devise or bequest. The residuary bequest in this will is fair and proper on its face, and that is all that is required. The act of probating the will is the probating of all its parts. A devise of real estate vests such estate at once in the devisee, the title of such devisee being liable to be defeated if the estate be necessary for the payment of debts or the expenses of administration. Sec. 15, c. 74, R. S., reads as follows: "No will is effectual to pass real or personal estate unless proved and allowed in the probate court." This will has been approved by the probate courts below and above with no questions or exceptions thereto pending. But it

is said the bequest of the personal estate cannot be carried into effect until a distribution has been ordered and the executors' accounts have been approved. We think that even this fine technicality may be avoided by the executors, if need be. They would be justified in paying all the property left in their hands as residuary estate without any order therefor, should the devisees be willing to accept it and discharge the executors from their responsibilities. A good many estates are settled by the parties interested without any aid or order from the probate court.

The foregoing reasoning only serves to illustrate the unsubstantial foundation upon which it is endeavored to raise a technical excuse for pronouncing a deed voidable and a devise absolutely void. The true and conclusive answer, however, to this indefensible position of the complainants is that it is utter assumption on their part in declaring a devise like this to be void when it is voidable merely, and can be rendered void in no way other than by the act of the Government itself. No wrongful act by a corporation renders its charter void or creates any forfeiture without proceeding by which such forfeiture shall be established. A cause for forfeiture is not itself forfeiture. The same section which prescribes the amount of property which this corporation may hold also declares that it may use and dispose of the same for the purposes for which it was organized. Suppose the corporation wrongfully uses or disposes of its property, could any party but the State intervene to punish the corporation for such transgression?

Now what is there illegal, let us ask, in this court or in the probate court below acting in the furtherance of bequests that are simply voidable and consequently valid until they have been declared to be otherwise upon the intervention of the State? If the State has the exclusive privilege, as it has, of rendering the voidable bequest void, what is there wrongful in our regarding it as sound and sufficient while the question of its validity is not acted upon by the State, or the error is waived or permitted by the State? What right has the judicial branch of the Government to dictate what the State should do against its will or its policy, and decide a question for the State which the State can better decide for itself? What right has the court to deprive the State of all opportunity to determine whether it will thus severely punish this corporation for the mistake of the testator or will waive or overlook it? Certainly the State should not be prevented from making such election. If courts at the instigation of heirs can refuse to act upon voidable bequests as valid until avoided by the State, then, as a matter of course, the State can practically never have any opportunity to exercise its discretion in such a case any

more than as if such right never existed, and the court would be assuming the prerogative of really acting in opposition to the State. The court could not exercise any broad discretion in the solution of the question, while the State could. It certainly is an excellent policy to refer such questions to the discretionary power of the State, which can determine them, according to the circumstances, upon the great principles of justice and generosity, and in conformity with the wishes and welfare of the whole community. Among so many societies and associations as are organized under the general statute there will always be exceptional cases where, from their amount of business or other causes they have come to exceed the limitation of capital allowed them, and it is reasonable that the State should have the privilege, if it pleases, of relaxing the statutory restraints in such exceptional cases. And the circumstances of the present case make the strongest appeal for the protection of this devisee against the loss of the generous gifts to it from one who loved the institution as he would have loved his child, and who devoted to its interests his time and services, and, as he supposed, a goodly share of his estate which had been earned by his industry and economy for a long lifetime. And it may not be amiss to state the fact that the legislature has lately increased the limitation of capital which the infirmary may hold from one hundred thousand to one million of dollars.

There is but little authority, either English or American, favoring the conclusion that bequests or devises not strictly authorized by law are to be considered void instead of voidable. This will be seen in the examination of cases in this country to be made in the progress of this discussion. But it may also be worth the while to notice what application has been made of the principle by the English courts in view of the statutes of mortmain as existing in that country. In *Grant on Corporations*, a reputable English work on the subject, at page *101, the author states the doctrine as follows: "The meaning of the term unlicensed corporation is this. As was observed above, the conveyance of lands to a corporation was not made void to all intents and purposes by the statutes of mortmain, but only voidable at the option of the lords and the Crown; consequently if the mesne lords and the Crown all consented to waive the escheat, each in their respective rights, the corporation to whom the land was granted enjoyed the property unmolested. In process of time the rights of the lords becoming difficult to trace, a license from the Crown was generally considered sufficient to ascertain the right of property to the corporation; and this license it became usual for corporations to obtain from the Crown, enabling them to take lands to such a value, notwithstanding the statutes of mortmain. In strictness, however,

the license to hold in mortmain was only a waiver of the right of the Crown to enter on the lands alienated; for as no royal charter can *per se* take away the property, or prejudice the interest of the subject, such license did not abrogate the right of the mesne lords to enter, and therefore, with respect to them, the corporation was not secure until the lapse of the periods respectively limited for the assertion of their rights. In fact, the King's license had only the effect of waiving the Crown's right to the escheat, etc." The author further says: "The question is of the more importance, as there is no doubt that many corporations have greatly exceeded the limits of their license, and hold such surplus lands without any right derived from it for their doing so. It is clear, however, that if a corporation have exhausted their license to hold in mortmain, the fact does not make a devise or conveyance to them void. The only result is that they may take, though, unless they can obtain an extension by the Crown of their license, they cannot hold the lands, unless the mesne lords and the Crown choose to sleep upon their respective titles."

The cases in this country, most of them which favor the principle that an estate in the condition this is goes to the heirs of a testator rather than to the devisee, seem to inculcate the idea that the heirs may waive their right so as to allow the estate to pass to the devisee. And we have not the slightest doubt that but for the interference of the heirs in the present case by this bill in equity, no obstacle would have stood in the way of a complete administration of the testator's estate according to his clearly expressed intention. No court would have had the least hesitation in following the ordinary course of procedure, or would have entertained the thought, *suo moto*, of instituting inquiry to see whether the bequests in question were valid or not. But why should a bequest, invalid when not consented to by the heirs, become unobjectionable when such consent is obtained? If illegal as coming from the testator, why not just as illegal when coming from the testator and his heirs? Such considerations as these go to show how illogical and untenable a position it is to denominate the devises and bequests in the present will absolutely void.

Each side relies on certain authorities in defense of its position, and between the two sides many have been referred to.¹

The law authors are nearly or quite unanimous in their concurrence on the exact question presented for our determination. In Devlin on Deeds, vol. 1, sec. 120, it is laid down that "if a charter of a corporation forbids it to purchase or take lands, a deed made to it is void." And the author in the next following section (121) ascribes to the State the discretion of applying any remedy, saying

¹ The citation and discussion of these cases have been omitted.—Ed.

that "the general rule is that the State alone can take advantage of the clause of the charter prohibiting a corporation from holding land." In *Beach on Private Corporations*, sec. 378, it is said that "no party except the State can object that the corporation is holding real estate in excess of its rights." And it seems to us that it is a consistent deduction from that proposition to say that no party but the State can object to any effort by a corporation to acquire real estate. How can a thing be wrong in the beginning and right in the end? How can it be logically said that a contemplated act is wrong and as soon as consummated is right? It would seem as if the first step toward a wrong act would constitute less offense than the last step would.

Says Mr. Perry, in his reliable work on Trusts, "if a corporation takes land by grant or bequest in trust or otherwise which by its charter it cannot hold, its title is good as against third persons and strangers; the State only can interfere." Perry, *Trusts*, sec. 45.

The quotation below from Schouler on Wills (sec. 24) directly implies that the bequests he is speaking of are merely voidable, for if void a legislature at its will could not cure the difficulty. The author says: "But limitations and restrictions under the act of incorporation should here be regarded to the extent, at least, of procuring an enabling act from the legislature to hold the property where the original charter privileges would otherwise be transcended. In Massachusetts and many other States no disability to take by either devise or bequest is imposed by the Statute of Wills upon corporations. But the American rule is not uniform. Under the New York code, for instance, it is expressly declared that no devise to a corporation shall be valid unless the corporation be expressly authorized by its charter or by statute to take by devise."

The text of the section, in Pritchard on Wills, sec. 153, an extended note to which we have already incorporated in this opinion, on a review of the authorities, says that when a corporation is already holding as much land as it is authorized to hold, its right to land devised to it can be questioned by the State only unless, as in New York, there is some statute declaring the devise to be void. It is said in *Morawetz on Pri. Cor.*, sec. 671, as follows: "The statute of New York prohibiting devises of real estate to corporations, unless expressly authorized by their charters or by statute to take by devise, renders prohibited devises absolutely void; and it has been held that the legislature cannot by subsequent enactment validate a devise which is void under the statute, for this would impair the vested rights of the heir.

"A distinction should be observed between the effect of laws

restricting the power of testators to devise their property to corporations and laws restricting the power of corporations to take property. Such laws differ both in their application and in their legal effect." Again the author says in another section (332) as follows: "A distinction should be observed between those laws whose object it is to regulate corporations in respect of their power of acquiring and holding property and laws whose object is to restrict the power of testators to dispose of their property. Laws of the former description are enacted in pursuance of a general policy of preventing corporations from acquiring the ownership of real estate in the absence of express authority from the State. But laws prohibiting devises to corporations are intended to restrict the testamentary capacity of testators, and their object in many instances is to prevent testators from being driven by the improper use of religious influence to devise their property to religious institutions, and thus disinherit their heirs."

Mr. Thompson, the learned and able commentator on corporations, in his work, which is the latest of any in this country on the subject, considers carefully the precise point in dispute between the present parties; and in a lengthy section fairly and fully states the effect of the authorities on both sides, and expresses his own opinion on the point in very positive terms in the manner following: "According to one view, if the amount of land which a corporation may hold is prescribed by its governing statute, and if it has already acquired lands to such an extent that a further devise to it will exceed that limit, then, in so far as the devise is in excess of that limit, it is void, and the title vests in the heirs. In such a case the principle that the State alone can question the right of the corporation to hold the lands does not in the opinion of some of the courts apply, but the heirs of the testator can raise the question. Nor in such a case is the construction put upon the language of the statutes of mortmain applicable, making a distinction between the power to take and the power to hold; but such a statute in the absence of some plain expression showing the contrary intent, is construed as prohibiting a taking where the prescribed limit has been reached. But other courts have taken the view that here, as in other cases, the question of the capacity of the corporation to take is one which can be raised by the State alone, and this is the only view sustainable on the analogies of this question. That view is that a devise to a corporation, incapable for that or any other reason from taking, is good as against every one save the State; just as is a deed to a corporation or to an alien; so that whenever the State waives its objection to it, that is an end of the discussion. But under the former view the devise is void only as to the excess; it is good up to the statu-

tory limit, though there may be difficulty in determining that limit. Moreover, under this doctrine an act of the legislature passed subsequently to the death of the testator, enlarging the power of the corporation to take, will not affect the rights of the heirs, because the title vests in them instantly on the death of the testator, and it is not competent for the legislature to divest it." *Thomp. Corp.*, sec. 5787.

The author, in sec. 6033, characterized the question as follows: "These considerations bring us to the somewhat new and growing doctrine, that whether a corporation has acted in excess of its granted powers or in the face of an expressed or implied statutory prohibition is one which cannot be raised in litigation between it and a private party or between private parties, but can only be raised by the State in a direct proceeding, either to forfeit the franchises of the corporation or to subject it to punishment for doing the unlawful act." Other extracts from Mr. Thompson's book could be profitably added hereto, if it were reasonable to usurp so much space.

The complainants quote a part of a section from the same author, as follows: "This principle [that the State alone can interfere] has no application where the corporation is seeking the aid of a court of justice to enable it to acquire lands which it has no power to acquire and hold. Here the principle is that a court of justice will not aid a corporation to do that which is impliedly forbidden by its charter or by the law." This might be misleading if read without the omitted portion of the section, which is as follows: "It has, for instance, no application to a case where a suit in equity is brought to compel the specific performance of a contract to convey land to a railroad company, which the latter has attempted to acquire, not for any purpose connected with the building and operating of its road, but merely for speculative purposes. In such a case the specific performance was refused on the ground, among others, that the company had no power under its charter to take and hold land for such purposes." It is evident enough from the omitted extract, as well as from the citation in the note to the section, that the meaning of the author is not inconsistent with his avowals in other sections of the work. The section applies to cases when a corporation has no power to be exercised and not merely where it exercises an excess of power of the same kind as that authorized by its charter. See, on this point, *Case v. Kelly*, 133 U. S. 21.

The complainants quote in their brief an article in the *Harvard Law Review* (January, 1896), in which the writer, who was said at the argument by counsel for complainants to be a recent graduate of Harvard Law School, favors, upon the admittedly doubtful

question, the view taken in the McGraw case and not that adopted by the United States Supreme Court. But the writer makes no allusion to the fact that the opinion in his favorite case was based on certain stringent statutes of New York affecting the testamentary capacity of the testator to give, as well as upon the lack of ability in the donee to receive, while a different question was presented in *Jones v. Habersham*, *supra*, in which Gray, J., wrote the opinion. The writer also asserts that the latter case received but slight consideration at the hands of the court, he evidently not being aware that the same case was first deliberately considered and decided by the Circuit Court, where Bradley, J., of the Supreme Court, delivered the opinion, Gray, J., stating that fact in the first line of his own opinion. The complainants also cite a bare remark in Bigelow's edition of Jarman on Wills, in note on page 63 of 6th edition, in which the editor seems to regard the doctrine that such a gift is invalid as the better doctrine.

But that learned author, in his brief note on the subject, takes no notice of the distinction between a want of testamentary capacity to give and a mere lack of authority in the corporation to take.

Taking now a retrospective glance at the cases and authorities on both sides which we have noticed in the foregoing pages, we feel impressed with the correctness of the statement of Strout, J., at the hearing of this case below, that the decided weight of authority is in favor of these respondents on this "new and growing question," as the author Thompson expresses it. Upon closing his discussion of the direct cases cited on his opening brief, the learned counsel for the complainants says: "But if the decisions of New York are claimed to rest upon the provisions of special New York statutes, what has the counsel to say as to all the other cases cited by the plaintiffs from North Carolina, from Kentucky, from New Jersey, and from Rhode Island?" We have substantially, according to our view, answered the question ourselves by saying that the force of the opinion of the two judges in the North Carolina case is much lessened by the able minority opinion of the chief justice in the case, and by the fact that the majority opinion yields the question as to devises of real estate; that the Kentucky case is a better authority for the respondents than for the complainants; that it is not sure that the complainants have any support in the New Jersey case outside of that contributed by the chief justice in his opinion; and that the Rhode Island case evidently follows the decisions in New York. How little authority, then, have the complainants to rely on outside of the McGraw case in New York? We have no reason to doubt the correctness of the result of the decision in that case, as based upon exceptional stat-

utes in that State not existing elsewhere. And, should we undertake any criticism of that opinion, it would be that while the case was decided upon the statutory policy of that State, the opinion endeavors to bend into line with its policy the policy of other States, where no such peculiar conditions are found to exist.

The counsel for the complainants have very critically reviewed the cases cited against them, and in some respects, as seems to us, argument would sweep away much of the more direct authority, and all of the auxiliary cases as about worthless. This is too extreme. Of course, the cases of each class are not entirely alike, and may be of various degrees of force as authorities. But they all go to illustrate as well as to bring out the underlying principle on which a settlement of the case before us depends, and most or many of them are enough alike in support of the principle involved as to be regarded as leaves from the same tree.

The counsel rebel against regarding the National Bank cases as fitting precedents in support of the question here, but they are so regarded in some cases and by some authors, which shows how other minds than ours are influenced by them. So the counsel protest just as strongly against the alien cases as being of any importance as authority. But that class of cases is constantly cited in the books as supporting by analogy such a position as the respondents stand upon here. Deeds to aliens may not be of principal importance, but it seems to us that devises to aliens, which are good at common law, are clearly cases in point and of more consequence as precedents than any other analogous authority. Does not the will containing a devise to an alien have to be approved with the same formalities as are required of the will of the present testator, and is the land devised any more in the possession of the devisee in the one case than in the other? It is argued in behalf of complainants that there is this distinction between an alien as devisee and a corporation as such; that in the case of an alien the disability is personal and does not attach until proved by some direct and not collateral proceeding, as bankruptcy must be proved in the case of a bankrupt or as felony must be proved in the case of a felon, before the full consequences of such a condition fall upon them. There must be a conviction. Is not that the very contention of the respondents here? What is there in this will which should lead a court to establish any illegality except by a direct proceeding for the purpose? And why should the law be any more generous to a bankrupt or a felon in the dispensation of its favors than to a charitable association? At common law, and by the statute law of some of the States, an alien can take real estate by devise and hold the same until office found to take it away from him. It is also argued for the complainants

that executory contracts of an illegal nature where the illegality is participated in by both parties cannot be enforced by one party against the other, the parties being equally in fault. That principle is not applicable here. The executors and the corporation are not parties contending against each other. They are on the same side of this suit. It is admitted by the corporation that it would be a transgression of the law of its organization to accept the bequests unless the State actively or passively consents to it, and its silence is its consent. But what wrong has the testator committed by his act? The only contract that can be pertinently discussed here is that between the State and the corporation, and the State can do no wrong.

A few of the more important propositions pertinent to the case may, in conclusion, be briefly restated as these: That there is no restraining clause in our Statute of Wills preventing the testator from making these devises and bequests; that they are regular and valid on their face, nothing in the will indicating that the corporation might not be a competent trustee to administer the gifts; that the testator had no suspicion that there would be any question over the provisions of his will; that if the bequests fail, it will be an accident caused by a mistake of the testator respecting a fact or as to the legal construction of such fact; that the same bequests (and devises) could have been safely made to almost any individual or to any one of many charitable corporations in the State instead of to this corporation; that there is a very narrow difference, if there be any, between selecting this institution and selecting any other suitable trustee for the execution of the trusts committed to it, such a corporation as this being merely a technical and metaphysical entity through which the benefit of the trusts were to go to poor persons suffering from certain diseases; that the heirs could have no voice or interest in the matter, unless accidentally so through the innocent mistake of the testator, they having no lien on the estate of either a legal or moral kind; that there are no words in the charter of the corporation, or in the statute authorizing its organization, that forbids it holding more than the amount limited by the statute, nor any penalties attached whereby to punish any transgression of the limitation, the only punishment intended being the risk of a forfeiture of the bequests, or of the charter; that the limitation is chiefly directory and regulative, and if impliedly prohibitory, incidentally and mildly so; that the charter is a contract between the corporation and the State in which no person is legally interested but the parties thereto, the same general rules of interpretation applying as in other contracts; that if the corporation fails to keep its side of the contract the State can take advantage of the default or not as it pleases;

that the transgression may be so slight in its consequences that the State will forgive the offense, or forgive it because occasioned by some accident or error resulting while the corporation is acting in good faith, or the State may, acting through its prosecuting officers, punish the offense for the public good; that the State may, by its legislature, authorize the corporation to increase its capital before the act is done, or, if the increase be made without authority, may ratify the act afterward, either by some legislative provision or, as may be done between any other contracting parties, by its silence and any other acts indicating consent; that from the foregoing propositions it is clearly deducible that bequests like the present are voidable only, and may be avoided by the State alone, and are in no sense to be regarded as void; that a policy arose as to what better be done in the circumstances of each particular case, and that that policy belongs to the State and not to the court, and is an executive and not a judicial right, for the court would decide the question in the case for all cases and all time, while the State may decide the question differently at different times according to its discretion and the public good. This right the State has never surrendered and the court cannot take it from the State. But it would surely deprive the State of its privilege if the court fails to act upon these bequests as valid bequests until, in proper and independent proceedings, such bequests are declared to be void.

This conclusion renders it unnecessary and inexpedient to discuss the further contention of the respondents that the bequests are valid in equity if not at law, upon the maxim that no legal trust of a charitable nature shall fail for want of a competent trustee, and that if this corporation cannot act some other party may be appointed by the court that can.

Exceptions overruled.

Appeal dismissed, and decree below affirmed.

SECTION V.—POWER TO TRANSFER PROPERTY.

JOHN KEAN, COMPLAINANT, *v.* JOHN T. JOHNSON AND
OTHERS.

IN THE COURT OF CHANCERY OF NEW JERSEY, OCTOBER TERM,
1853.

[*Reported in 9 New Jersey Equity Reports 401.*]

JOHN KEAN files his bill in this court against John T. Johnson and others, individuals, and the Somerville & Easton Railroad Co., otherwise called the Central Railroad Co. of New Jersey, of which

they are directors, praying an injunction and other relief; to which bill the defendants have filed a general demurrer.

The bill states that under an act of the legislature, passed February 9, 1831, a corporation was organized, called the Elizabethtown & Somerville Railroad Co., which soon after went into full operation; that in 1839-40, being in want of funds to pay for the making of the road, the company borrowed large sums of money, for which they mortgaged not only its property, but its franchises or chartered rights; which mortgages by a supplemental act were validated by the legislature and consent of two-thirds of the stockholders, which consent was by said act required; that afterward these mortgages were foreclosed, a sale had, and a deed conveying all the property and chartered rights of said company, duly made to Stearns & Colket, purchasers at the mortgage sale; that these purchasers divided the ownership and propriety of their purchase into eight thousand shares of capital stock, one thousand five hundred shares of which the complainant bought, and part of which he still holds; that under this creation of new stock a new company was organized, a new rail laid over the road, and the business of transporting freight and passengers was begun and carried on with renovated and much increased power and success.

The bill further states, that in 1847 another company was chartered by the legislature to construct a railroad from Somerville to Easton, and called the Somerville & Easton Railroad Co., in which the individual defendants named in the bill (with two exceptions) owned a large majority of the capital stock, and have always been the directors; that about the latter part of 1848 they combined together for the purpose of amalgamating the two companies under a different organization, and of compelling the other stockholders of the Elizabethtown & Somerville Railroad Co. to surrender their stock; and procured the passage of a supplement to the act to incorporate the Somerville & Easton Railroad Co., which is set forth at length in the bill.

The act provides as follows:

1. That it shall be lawful for the Somerville & Easton Railroad Co. to purchase the road constructed by the Elizabethtown & Somerville Co.
2. That if payment of said purchase can be made in stock, the Somerville & Easton Railroad Co. can issue so much as shall be required for that purpose.
3. That the purchased road shall be and become a part of the road authorized to be constructed by the Somerville & Easton Co., and regulated by its charter, and that that company shall thereafter be known as the Central Railroad Co. of New Jersey.

Provided, That nothing in this act contained shall in anywise

affect any right whatever, either at law or in equity, of any stockholder or other person in, or any claim or demand against the Elizabethtown & Somerville Railroad Co., or any lien whatever upon said railroad or upon any property which by virtue of this act shall be transferred or conveyed. *And provided further*, That upon such purchase as aforesaid being completed, the said Central Railroad Co. of New Jersey shall thereby become responsible for all debts contracted by the Elizabethtown & Somerville Railroad Co., since the foreclosure of the mortgage or mortgages under which the present stockholders of said last-named company claim to hold the said railroad, and shall be liable therefor in law and equity, in like manner as if the said debts had been contracted by the Somerville & Easton Railroad Co. *Provided also*, That the said purchase shall be made with the consent of the last-mentioned stockholders.

The bill then further avers that, after the passage of this act, and about April 1, 1849, the individual defendants in the bill, holding a large majority of the stock of both companies, and being directors of each, and constituting almost the entire boards, did proceed, using and proceeding in the names of said companies respectively, and assuming to act as said companies, to continue and carry out a bargain and agreement between the said two companies for the sale of the railroad and other property and appendages of the Elizabethtown & Somerville Railroad Co., and procured of Stearns & Colket, the purchasers at the master's sale, a deed conveying to the latter company all the property and appurtenances of said road as the same were conveyed by the master to them.

The two roads thus united, the name was changed to "The Central Railroad Co. of New Jersey," and under that name the corporation has since carried on operations over the road and with the property of the Elizabethtown & Somerville Railroad Co.

The complainant further avers that he was and is owner of two hundred and seventy-five shares of stock in the Elizabethtown & Somerville Railroad Co., as issued anew by Stearns & Colket; that Thomas A. Hartwell and William Thompson also were and are owners of a large number of said shares, but that they neither of them gave any consent to this proceeding, but protested against the sale of their road, and still continue to protest against and resist it.

For this reason the complainant insists that the purchase and sale made was not valid, and that all subsequent proceedings of said Central Railroad Co., in taking possession of said Elizabethtown & Somerville Railroad, with its appendages and appurtenances, and in exercising control and dominion over them, are alto-

gether fraudulent against the complainant and the other dissenting stockholders, and void.

Complainant then avers the existence of a large and profitable business on the road between Somerville and Elizabethtown from the year 1846, and that a considerable surplus had been gathered at the time of the sale complained of; and that the new corporation has mortgaged all its property heavily (to the amount of one million, five hundred thousand dollars) to raise money for the purpose of extending the road to Easton—an additional fraud, in the view of complainant, upon all stockholders not consenting to the sale of the Elizabethtown road.

The bill then prays that the defendants—namely, the directors, individually, of the two roads, the mortgage trustees, and the corporation, by whatever name rightly called—may discover and disclose the full amount of the earnings of said Elizabethtown road from the commencement of its operations under the Stearns & Colket purchase to the present time.

That defendants may account for these earnings. That the purchase complained of and the bonds and mortgages may be declared void, and of no validity whatever, and for an injunction against any further issue of any bonds or mortgages upon said road by the Central Railroad Co.

The chancellor having been concerned as counsel for defendants, the matter was referred to Cortlandt Parker, Esq., one of the masters of the court before whom it was argued.

J. P. Bradley and *W. L. Dayton* for complainants.

Frelinghuysen and *Zabriskie* for defendants.

CORTLANDT PARKER, Master in Chancery. The questions raised by the demurrer in this cause are twofold:¹

1. What is the proper construction and meaning of the proviso to sec. 3 of the act recited in the bill passed February 22, 1849? Does that proviso require the consent of all the stockholders of the Elizabethtown & Somerville Railroad Co. before the purchase of the road by the Somerville & Easton Railroad becomes valid? or only the consent of a majority of said stockholders?

2. If the proviso does require the consent of all such stockholders to constitute a valid transfer of the road, can the remedy sought be given in the present suit?

Notwithstanding the extremely able and ingenious arguments of the counsel for the demurrants, it seems to the master that the plain language of the statute in question requires the consent of all the stockholders of the Elizabethtown & Somerville Railroad Co., before the road in which they as stockholders have a joint ownership, under the purchase by them, and the acts of the legisla-

¹ A portion of the opinion has been omitted.—Ed.

ture in reference thereto, can be sold and conveyed away from them.

The act, by its first section, empowers the Somerville & Easton Co. to buy the other road. The second section empowers the purchase, if the terms can be arranged, to pay the purchase-money in their own stock, and to issue sufficient therefor. The third section makes the road, when so purchased, part of the road authorized to be constructed by the Somerville & Easton Co., and extends the charter of the latter over it. It also changes the name of the consolidated company, on completion of the purchase, to that of the Central Railroad of New Jersey, and directs that all suits pending against the Somerville & Easton Co. shall proceed to judgment against the Central Railroad of New Jersey; and then comes the proviso which is the subject of dispute, and which has already been at length recited.

The language of this proviso is very general and comprehensive. "Nothing in this act contained," is its first branch, "shall in anywise affect any right whatever, either at law or in equity, of any stockholder or other person in, or any claim or demand against the Elizabethtown & Somerville Railroad Co., or any lien whatever upon the said railroad or upon any property which by virtue of this act shall be transferred or conveyed." Again, says the proviso in its second branch, "upon such purchase as aforesaid being completed, the Central Railroad of New Jersey shall thereby become responsible for all debts contracted by the Elizabethtown & Somerville Railroad Co. since the foreclosure of the mortgages under which its present stockholders claim to hold the said road. And lastly, this branch provides, the "said purchase shall be made with the consent of the last-mentioned stockholders."

What rights, then, had the stockholders of the Elizabethtown & Somerville Co. at law or in equity in that corporation? Does a sale of the road, which was the source of all their emolument, actual or prospective, whose possession was the very condition of their actual, if not technical being, and the diversion of their capital to other employment, affect in anywise their rights? If so, by the clear meaning, almost the express words of the proviso, they had a right to dissent, and that dissent prevented the transfer permitted by the act, at any rate so far as regarded them. If a transfer, it did not affect the rights of the dissentient, whatever other effect it might have. I cannot divert my mind from the conclusion that a sale of their road, and the employment of the capital they invested in it to other uses, does affect the right of every stockholder in a railroad company. As stockholders, they own the road in common, to be employed in specified uses. Each owns a share in the whole, and is to have a proportionate share in its profits. (By *Byrnes*)

They have invested a portion of their capital in it, and in it alone. They have a right in the road, and in every dollar it earns. The directors are their trustees, to employ the joint capital in the management of the road, and the road only, to the end that from the investment the stockholders have chosen they may reap the contemplated profits. And this is the agreement of the stockholders among themselves. They each contract with the other that their money shall be so employed. What the majority determine within the scope of this mutual contract they each agree to abide by, but there their mutual contract ends, and no majority, however large, has a right to divert one cent of the joint capital to any purpose not consistent with and growing out of this original fundamental joint intention.

*misleading
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To sell the road, to abandon the contemplated investment and embark in another scheme, whether entirely different, or only more extensive than the original contemplation as apparent on the face of the charter, is, it seems to me, clearly contrary to the rights of the individual stockholders. If they had any right as partners or beneficiaries, it would seem to be this, that their money should be devoted to that use, and never employed in any other, nor returned to them before they desire it. The mere statement of the proposition seemed to me to prove it. No argument, however lengthened, can add to the force of the naked position.

The general principle here asserted has frequently received the sanction of the courts both of England and this country. It is the same, whether applied in the case of private associations or incorporations. "It is not, I apprehend," says Lord Eldon, "competent to any number of persons in a partnership (unless they show a contract rendering it competent to them) formed for specified purposes, if they propose to form a partnership for different purposes, to effect that formation by calling upon some of the partners to receive the subscribed capital and interest and quit the concern." "And again," he says in the same case, "those who seek to embark a partner in a business not originally part of the partnership concern, must make out clearly that he did expressly or tacitly acquiesce." *Natusch v. Irving*, Appendix to *Gow* on Part. 576, Am. Ed. 1830. And see also the opinion of Kent, C., in *Livingston v. Lynch*, 4 Johns. Ch. R. 573. So in incorporations. Nothing is more certainly settled than that any fundamental alteration of a charter, or material deviation from, or extension of a road, in the case of road companies, interferes with the rights of the incorporators, and that no majority, however large, can compel any individual stockholders to submit.

But it is contended on the part of the defendants that by the sale of their road no rights of any stockholder in the Elizabeth-

town & Somerville Railroad Co. are affected ; that the majority of stockholders have the power and the right at any moment to sell all the property of the corporation and quit business. And that if they pay over to him the profits of the business while it is carried on, and his proportionate share of the proceeds of sale, the "rights" of every stockholder are satisfied, and he can claim no farther at law or in equity.

I answer, first, if this be so, the proviso in question was singularly useless and uncalled for. No act on the part of the legislature was necessary to protect their rights. They might most safely have been intrusted to the care of this or the other courts. But without dwelling on this observation, is the doctrine contended for true? Is it the law that a majority of stockholders in any corporation, however prosperous its business affairs may be, can, at their own mere caprice, sell out the whole source of their emoluments, invest their capital in other enterprises, and that however the minority may desire the prosecution of the business in which they had engaged, they have no injury to complain of, at law or in equity, so long as they obtain their proportion of the proceeds of the sale?

On principle this position seems to me unsound. If it be true, a minority is entirely in the power of a majority, and the moment a rich man or a few rich men see what they deem a better investment for their money than the corporation in which they are already stockholders, they may compel the poorer members of the company to abandon profits satisfactory to them, and either risk the little they have, according to views from which they differ, or take back their money to lie profitless on their hands, until they find another investment. Or, more nearly to approach the case in hand, as asserted by the complainants, if a rich man or a number of rich men possess a controlling interest in two roads whose termini meet, one already successful, the other not built or needing nursing care, they may compel the poorer stockholders either to abandon or postpone the profitable use of their share of the capital, or take back their money and give up an investment, which perhaps their own enterprise suggested, and their own perseverance recommended to the attention of others, and hazard the finding of a new investment and a repetition of the same destruction of it. If such were the law corporations would soon be few, for seldom would capitalists, whatever their comparative wealth, invest in enterprises so readily rendered profitless at the caprice or in obedience to the interest of any man or set of men rich enough to control the majority of stock.

That the majority should have the power claimed for them does not seem to me to be the contract between the stockholders, for

there is a contract, as already shown, in the case of every corporation, between them. That contract is that their joint funds shall, under the care of specified persons, generally called directors, be employed, and that for certain specified purposes. Sometimes the duration of such employment is limited in the charter, and then until that time it must continue so employed, unless, perhaps, in case of clear loss. Sometimes no time is fixed by the charter at which the proposed use of the capital shall cease, and then the contract between the parties is, that so long as the affairs of the company are prosperous, it shall go on, unless all consent to the contrary. The charter of the Elizabethtown Co. defines no period for its expiration; it is, however, such a corporation as naturally must, at its origin, have been expected to continue permanently, and by one section of its charter it is provided that at the end of fifty years from its completion, the State has the right to take the road at an appraisement, a provision which may have been one reason for the privileges conferred. The charter bears date February 9, 1831, and there was, of course, at the date of the act of 1849, a long period to elapse before the half century expires. True, the present stockholders are not the originators of the road, nor do they claim by transfer of stock from the original holders, but nevertheless, by the act legalizing the mortgage of the franchise and property, the purchasers at the mortgage sale were substituted to all the chartered rights of the first owners of the stock, and the charter is still the only evidence of the character of the contract. It must be inferred, then, that they, like the first stockholders, expected and embarked their means in the enterprise on the faith that it was to continue, if prosperous, at least till the fifty years elapsed.

It can hardly therefore, I think, be argued with justice that a majority of the stockholders had a right, upon principle, to sell out all the property of the company from which its profits were to be realized, and abandon the business, and that the minority's rights are satisfied by a division to them of the value of their stock.

It may, indeed, be true, as urged in the argument, that corporations have a right to sell their property not limited by quantity; and where they sell, as they buy, for corporate purposes, a court of equity would not, without other circumstances, restrain them. But on the other hand, to cite the language of a learned author, "how far, under what circumstances, and upon what application a court of equity would restrain a corporation from an improper alienation of its property, must depend upon the general principles which guide it in the exercise of its powers; but there is little doubt that in a proper case made it would interfere to prevent a disposition of its property for other than corporate pur-

equity

poses. Angell & Ames, p. 190, referring to Binney's case, 3 Bland. (Md.) Ch. R., 142. And the opinion of Lord Eldon in *Natusch v. Irving*, is expressly in point, unless there be a difference in the rights of partners in a joint-stock association and in a corporation. In that case the defendants had offered to pay back all that the orator had paid into the company, with interest, and also fully to indemnify him against all loss by the transactions of the company in the business which was beyond the original articles. Lord Eldon to this part of the case replies in substance, as already stated, that it is not competent for any number of persons in a partnership (unless so provided for) formed for specified purposes, to effect that formation by calling upon some of the partners to receive back their capital stock and interest, and quit the concern; which, in effect, would be merely compelling them to retire upon such terms as should be dictated to them, so as to form a new company; and he further says, that "it is the right of a partner to hold his associates to the specified purposes while the partnership continues, and not to rest upon indemnities with respect to what he had not contracted to engage in; and that a partner cannot be compelled to part with his shares, though for double what he originally gave for them; and that it may be his principal reason for keeping them, to have the partnership carried on according to the original contract." If a majority of partners, corporate or unincorporate, can sell out all their property and satisfy the rights of a dissenting partner, by a simple payment to him of his share, they "can compel him to retire," and "form a new company," and utterly evade and set at naught his "right to hold his associates to the specified purposes," and can "compel him to part with his shares" at any sum they choose.

It is again urged on the part of the defendants that the very enacting section of the charter of the Elizabethtown Co. gives to the corporation the power of selling and conveying all their property, and that, as this charter is the fundamental contract between the stockholders, the complainant has himself agreed to give to the corporation, and of course to the majority, the power of selling this road and all their property whenever they choose. The words in sec. 1 relied upon are these: "And they [the original corporators] and their successors by the said name and style [meaning the corporate name just before mentioned] shall be capable of purchasing, holding and conveying any lands, tenements, goods and chattels whatever, necessary and expedient to the objects of this incorporation." Now, it is argued, the company have by this language the power to convey away all they have the power to purchase and to hold.

The argument seems to me more plausible than sound. Admit-

ting that the words used have any greater force or wider meaning than that the corporation should buy, hold and convey, by that name, the whole argument falls by simply restating in terms the propositions contained in the words cited. They are these: that the corporators and their successors should, by their corporate name, be capable of purchasing any lands or goods necessary or expedient to the objects of this incorporation—that is, when it is necessary to the objects of the incorporation that it should purchase or hold any particular property, it can do so; when it is necessary or expedient to the objects of the incorporation that it should convey any particular property, it can do so. So that it is only when the objects of the incorporation require it that any lawful conveyance can be made. Can it be pretended that the objects of the incorporation require that the necessary source of its profitable existence should be sold and conveyed away?

There is nothing, I think, therefore, in principle or authority, to shake the conclusion already arrived at, that the sale of this road by the Elizabethtown & Somerville Railroad Co., at a time when its affairs were eminently prosperous, did affect the rights of its stockholders; that they had the right to retain their investment where it was, and as it was, and that their rights are not satisfied by a payment to them of their proportion in the proceeds of such sale.

But the real character of this purchase was such as to bring it precisely within the decisions already quoted. In form, it was a sale of the road; in fact, it was an extension of it—an addition to the originally proposed scheme. The franchises of the company have not in form been destroyed. They may be said to be in a state of suspended animation, and the road is governed by a newly created corporation composed by the union of two previously existing ones; and this consolidated company carries on two enterprises as one, which before were the several tasks and privileges of the originally created corporations.

Upon the whole case, I respectfully report to and advise his honor, the chancellor, that the demurrer of the defendants be overruled, with costs.

CENTRAL TRANSPORTATION CO. v. PULLMAN'S
PALACE CAR CO.

IN THE SUPREME COURT OF THE UNITED STATES, MARCH 2, 1891.

[*Reported in 139 United States Reports 24.*]

THIS was an action of covenant, brought September 21, 1886, by the Central Transportation Co., a corporation of Pennsylvania, against Pullman's Palace Car Co., a corporation of Illinois, to recover the sum of \$198,000, due for the last three-quarters of the year ending July 1, 1886, according to the terms of an indenture of lease from the plaintiff of all its personal property to the defendant, dated February 17, 1870, and set forth in full in the declaration.

The defendant filed several pleas, one of which was "that said indenture of lease was void in law as between the parties thereto, for the want of authority and corporate power on the part of the parties thereto to make and enter into said indenture of lease; and for that the same was in excess and in violation of the charters conferring the corporate powers on said plaintiff, and of the purpose of their incorporation." The plaintiff filed a replication, traversing the averments of this plea.

The plaintiff was originally incorporated December 26, 1862, by a certificate or charter, made, acknowledged, recorded, and filed in the office of the secretary of the commonwealth, as required by the general laws of Pennsylvania, which authorized companies to incorporate themselves, by voluntary act of the associates, "for the purpose of carrying on the manufacture of woollen, cotton, flax, or silk goods, or of iron, paper, lumber, or salt," or "for the manufacture of articles from iron and other metals, or out of wood, iron, and other metals," within the State, for a term not exceeding twenty years; and provided that every corporation so formed might by its corporate name purchase, hold and convey real or personal property, "necessary or convenient to enable the said company to carry on the business or operations named in such certificate;" and that its stock, property and affairs should be managed by a board of directors, a majority of whom in all cases should be stockholders therein and citizens of the State; and authorized the directors, subject to the revision and approval of the stockholders, to make such by-laws for the management and disposition of its stock and affairs, "and for carrying on all kinds of business within the objects and purposes of such company;" and forbade the company to use any part of its capital stock or other

funds in the purchase of stock in any other corporation. Penn. Stats. April 7, 1849, c. 368, §§ 1, 3, 4, 8; April 1, 1853, c. 186, § 2.

In accordance with the requirements of those statutes, the plaintiff's certificate of incorporation, or charter, stated the object for which it was formed, "the transportation of passengers in railroad cars constructed and to be owned by the said company in accordance with the several letters patent," four in all, described by numbers and dates; the place where its chief operations were to be carried on, Philadelphia; the amount of its capital stock, \$200,000; and its term of continuance, twenty years, the extreme limit allowed by the statutes.

By a special act of the legislature of Pennsylvania of February 9, 1870, c. 94, entitled "An act to extend the charter of the Central Transportation Co., to empower them to lease their property and increase their capital stock," the plaintiff's charter was extended for ninety-nine years from its expiration; and "said company are hereby empowered to enter into contracts with corporations of this or any other State for the leasing or hiring and transfer to them, or any of them, of their railway cars and other personal property, as well as "to increase their present capital stock two hundred thousand dollars."

On February 17, 1870, eight days after the passage of that act, the indenture sued on was made by and between the plaintiff and the defendant, which had been incorporated three years before, with a capital stock of \$100,000, by a special act of the legislature of Illinois of February 22, 1867 (declared to be a public act), "to manufacture, construct and purchase railway cars, with all convenient appendages and supplies for persons travelling therein, and the same" to "sell or use, or permit to be used, in such manner and upon such terms as the said company may think fit and proper."

The indenture, after the statement of the names of the parties, began with the following recitals:

"Whereas the parties hereto are engaged in the business of manufacturing railway cars, generally known as sleeping cars, under certain patents belonging to them respectively, and of hiring the same to railroad companies under written contracts, to be used and employed on and over the lines of the roads of said railroad companies, and receiving therefor income and revenue by the sale to passengers of the berths and accommodations therein; and

"Whereas the demands of the public for increased means of personal comfort and convenience in travelling, of avoiding repeated changes of cars over long routes of railroad, the necessity for affording, at fair and reasonable rates, these advantages, which cannot be extended by railroad companies themselves, re-

quire that every possible means should be adopted to meet such demands by avoiding the inconvenience and curtailing the expenses incidental to the maintenance of the business management and organization of two separate corporations."

It further recited that the parties (professing to act under the powers conferred upon them respectively by the special acts of the legislatures of Pennsylvania and of Illinois, above mentioned) had agreed that the plaintiff should demise, transfer and set over to the defendant, and the defendant should take, all the plaintiff's railway cars, contracts, patent rights and personal property.

By that indenture, accordingly, the plaintiff "granted, demised, transferred, and set over" one hundred and nineteen railway sleeping cars with their equipment, its contracts with sixteen railroad companies (copies of which were annexed to and made parts of the indenture), all its patent rights (an assignment of which, including the four specified in its charter and thirteen others, was also annexed to the indenture and made part thereof), and all its "personal property, rights, credits, moneys, and effects, rights of action, money due and to become due from licenses heretofore granted," to the defendant, its successors and assigns, "to have and to hold the above demised property, and all income, revenue, and profit to be derived therefrom," for the term of ninety-nine years from January 1, 1870, except so far as the contracts, patents and licenses should expire sooner; and the plaintiff expressly covenanted that it would use its influence to obtain renewals or new contracts in the defendant's name from the railroad companies; and that it "shall and will not engage in the business of manufacturing, using or hiring sleeping cars while this contract remains in full force and effect."

The defendant, on its part, covenanted to pay to the plaintiff annually the sum of \$264,000, in equal quarterly instalments, "during the entire term of ninety-nine years," unless upon a diminution of the revenue received from the railroad companies, the indenture should be declared void by the defendant, or the annual sums payable by the defendant be reduced, as therein provided; also to pay all the plaintiff's debts up to January 1, 1870, according to a schedule annexed, by which they were not to exceed the sum of \$63,998.69, that being the amount of cash transferred by the plaintiff to the defendant; to continue and carry on the business as authorized by its charter, during the existence of the assigned contracts or other like contracts with the same railroad companies; to keep in repair the cars and their equipment, and to renew and reconstruct them when needful; not to assign the indenture without the plaintiff's assent, nor to create any lien or mortgage upon the property that should impair the plaintiff's

rights under the indenture; that, upon the defendant's failure to make any quarterly payment for thirty days after due, the plaintiff might avoid the indenture, and thereupon the defendant should surrender the cars and equipment, assign to the plaintiff the contracts with the railroad companies and any unexpired patent rights, and cease to run or employ cars on the same lines of railroad; and, at the end of the ninety-nine years, to deliver to the plaintiff the cars and equipment in good order, and assign to the plaintiff any unexpired contracts with those railroad companies.

At the trial, in May, 1888, the plaintiff offered in evidence its original charter, the statute of Pennsylvania of February 9, 1870, and the indenture of February 17, 1870; as well as evidence tending to show that the defendant, under that indenture, entered into possession of the plaintiff's property, and continued in possession during the period covered by the declaration.

To the admission of all this evidence the defendant objected "on the ground that it was beyond the power of either corporation to make the contract; and also because it was null and void by reason of its being in restraint of trade and against public policy as preventing competition." The court sustained the objection, and excluded the evidence; and the plaintiff excepted.

The plaintiff then offered to prove, in addition to the above evidence, that in pursuance of the indenture of February 17, 1870, the plaintiff's cars, contracts, and patent rights were delivered to the defendant, and continued in its possession under the indenture, and the defendant insisted on retaining them until July 1, 1886, and the defendant then for the first time tendered them to the plaintiff and declared the indenture void, in accordance with its provisions. The defendant objected to this evidence; the court sustained the objection, and excluded the evidence; and the plaintiff excepted.

The defendant thereupon moved for a nonsuit, and the court granted the motion, and ordered a nonsuit, and refused a motion of the plaintiff to take it off; and the plaintiff again excepted. A judgment of nonsuit was entered accordingly; and the plaintiff tendered a bill of exceptions, which was allowed by the court, and sued out this writ of error.

John G. Johnson for plaintiff in error.

Edward S. Isham and *Wayne MacVeagh* for defendant in error.

GRAY, J., after stating the case as above, delivered the opinion of the court.

The principal defense in this case, duly made by the defendant, by formal plea, as well as by objection to the plaintiff's evidence, and sustained by the Circuit Court, was that the indenture of lease

sued on was void in law, because beyond the powers of each of the corporations by and between whom it was made.

There is a preliminary question of practice, arising out of the manner in which the case was disposed of below, which is deserving of notice, although not mentioned by counsel in argument.¹

But the judgment of nonsuit, being a final judgment disposing of the particular case, and rendered upon a ruling in matter of law duly excepted to by the plaintiff, is subject to be reviewed in this court by writ of error.

It was therefore rightly assumed by the counsel of both parties at the argument that the only question to be determined is of the correctness of the ruling sustaining the defense of *ultra vires*, independently of the form in which that question was presented and disposed of.

Upon the authority and the duty of a corporation to exercise the powers granted to it by the legislature, and those only; and upon the invalidity of any contract, made beyond those powers, or providing for their disuse or alienation; there is no occasion to refer to decisions of other courts, because the judgments of this court, especially those delivered within the last twelve years by the late Miller, J., afforded satisfactory guides and ample illustrations.²

The clear result of these decisions may be summed up thus: The charter of a corporation, read in the light of any general laws which are applicable, is the measure of its powers, and the enumeration of those powers implies the exclusion of all others not fairly incidental. All contracts made by a corporation beyond the scope of those powers are unlawful and void, and no action can be maintained upon them in the courts, and this upon three distinct grounds: the obligation of every one contracting with a corporation, to take notice of the legal limits of its powers; the interest of the stockholders, not to be subjected to risks which they have never undertaken; and, above all, the interest of the public, that the corporation shall not transcend the powers conferred upon it by law. A corporation cannot, without the assent of the legislature, transfer its franchise to another corporation, and abnegate the performance of the duties to the public, imposed upon it by its charter as the consideration for the grant of its franchise. Neither the grant of a franchise to transport passengers, nor a general authority to sell and dispose of property, empowers the grantee, while it continues to exist as a corporation, to sell or to

¹ So much of the opinion as relates to this question has been omitted.—Ed.

² The citation and discussion of cases have been omitted.—Ed.

lease its entire property and franchise to another corporation. These principles apply equally to companies incorporated by special charter from the legislature, and to those formed by articles of association under general laws.

By a familiar rule, every public grant of property, or of privileges or franchises, if ambiguous, is to be construed against the grantee and in favor of the public; because an intention, on the part of the government, to grant to private persons, or to a particular corporation, property or rights in which the whole public is interested, cannot be presumed, unless unequivocally expressed or necessarily to be implied in the terms of the grant; and because the grant is supposed to be made at the solicitation of the grantee, and to be drawn up by him or by his agents, and therefore the words used are to be treated as those of the grantee; and this rule of construction is a wholesome safeguard of the interests of the public against any attempt of the grantee, by the insertion of ambiguous language, to take what could not be obtained in clear and express terms. *Charles River Bridge v. Warren Bridge*, 11 Pet. 420, 544-548; *Dubuque & Pacific Railroad v. Litchfield*, 23 How. 66, 88, 89; *Slidell v. Grandjean*, 111 U. S. 412, 437, 438. This rule applies with peculiar force to articles of association, which are framed under general laws, and which are a substitute for a legislative charter, and assume and define the powers of the corporation by the mere act of the associates, without any supervision of the legislature or of any public authority. *Oregon Railway v. Oregonian Railway*, 130 U. S. 26, 27.

In the case at bar, the plaintiff was originally incorporated for twenty years from December 26, 1862, with a capital stock of \$200,000, by articles of association, called a certificate or charter, under general laws of Pennsylvania. It is not without significance that those laws required its stock, property, and affairs to be managed by a board of directors, a majority of whom should be stockholders therein, and citizens of the State; and forbade it to use any part of its capital stock in the purchase of stock in any other corporation. Those laws related to manufacturing companies only. But the purpose of its incorporation, as stated in that charter, was "the transportation of passengers in railroad cars constructed and to be owned by the said company" under certain patents. And, as appears by the recitals in the indenture sued on, the plaintiff carried on the business of manufacturing sleeping cars under its patents, and of hiring or letting those cars to railroad companies by written contracts, receiving a revenue from the sale of berths and accommodations to passengers.

The validity of the plaintiff's incorporation, as well as its power to make that indenture, however, depends not solely upon the

original charter and the general laws under which it came into existence, but mainly upon a special act of the legislature of Pennsylvania of February 9, 1870. By this act, the validity of the charter for the object therein named was clearly recognized; the charter was extended for ninety-nine years, nearly fivefold the period for which the corporation was or could have been formed under general laws; and the corporation was expressly empowered to double its capital stock, and "to enter into contracts with corporations of this or any other State for the leasing or hiring and transfer to them, or any of them," of its "railway cars and other personal property."

The plaintiff, therefore, was not an ordinary manufacturing corporation, such as might, like a partnership or an individual engaged in manufactures, sell or lease all its property to another corporation. *Ardesco Oil Co. v. North American Oil Co.*, 66 Penn. St. 375; *Treadwell v. Salisbury Manuf. Co.*, 7 Gray, 393.¹

But the purpose of its incorporation, as defined in its charter, and recognized and confirmed by the legislature, being the transportation of passengers, the plaintiff exercised a public employment,

¹ The views which we have taken dispose of the whole case. It is therefore unnecessary to go at large into a consideration of the other branch of the cause, which was fully and elaborately discussed at the Bar. But we entertain no doubt of the right of a corporation, established solely for trading and manufacturing purposes, by a vote of the majority of their stockholders, to wind up their affairs and close their business, if in the exercise of a sound discretion they deem it expedient so to do. At common law the right of corporations, acting by a majority of their stockholders, to sell their property is absolute, and is not limited as to objects, circumstances, or quantity. *Angell & Ames on Corp.*, § 127 *et seq.*; 2 Kent Com. (6th ed.) 280; *Mayor, etc., of Colchester, v. Lowton*, 1 Ves. & B. 226, 240, 244; *Binney's case*, 2 Bland, 142. To this general rule there are many exceptions, arising from the nature of particular corporations, the purposes for which they were created, and the duties and liabilities imposed on them by their charters. Corporations established for objects quasi-public, such as railway, canal, and turnpike corporations, to which the right of eminent domain and other large privileges are granted in order to enable them to accommodate the public, may fall within the exception; as also charitable and religious bodies, in the administration of whose affairs the community or some portion of it has an interest to see that their corporate duties are properly discharged. Such corporations may perhaps be restrained from alienating their property, and compelled to appropriate it to specific uses, by mandamus or other proper process. But it is not so with corporations of a private character, established solely for trading and manufacturing purposes. Neither the public nor the legislature have any direct interest in their business or its management. These are committed solely to the stockholders, who have a pecuniary stake in the proper conduct of their affairs. By accepting a charter they do not undertake to carry on a business for which they are incorporated, indefinitely, and without any regard to the condition of their corporate property. Public policy does not require them to go on at a loss. On the contrary,

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and was charged with the duty of accommodating the public in the line of that employment, exactly corresponding to the duty which a railroad corporation or a steamboat company, as a carrier of passengers, owes to the public, independently of possessing any right of eminent domain. The public nature of that duty was not affected by the fact that it was to be performed by means of cars constructed and of patent rights owned by the corporation, and over roads owned by others. The plaintiff was not a strictly private, but a *quasi* public corporation; and it must be so treated as regards the validity of any attempt on its part to absolve itself from the performance of those duties to the public, the performance of which by the corporation itself was the remuneration that it was required by law to make to the public in return for the grant of its franchise. *Pickard v. Pullman Southern Car Co.*, 117 U. S. 34; *York & Maryland Railroad v. Winans*, 17 How. 30, 39; *Railroad Co. v. Lockwood*, 17 Wall. 357; *Liverpool & Great Western Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397.

The evident purpose of the legislature, in passing the statute of 1870, was to enable the plaintiff the better to perform its duties to the public, by prolonging its existence, doubling its capital, and confirming, if not enlarging, its powers. An intention that it should immediately abdicate those powers, and cease to perform it would seem very clearly for the public welfare, as well as for the interest of the stockholders, that they should cease to transact business as soon as, in the exercise of a sound judgment, it is found that it cannot be prudently continued.

If this be not so, we do not see that any limit could be put to the business of a trading corporation short of the entire loss or destruction of the corporate property. The stockholders could be compelled to carry it on until it came to actual insolvency. Such a doctrine is without any support in reason or authority. The case of *Ward v. Society of Attorneys*, 1 Collyer, 370, cited by the plaintiffs, does not support it. They were not a trading corporation, nor were their affairs in an embarrassed condition. It was the case of the majority of a corporation attempting to surrender the old charter, and to pervert the corporate funds to a different purpose, by passing them over to a new association. Besides, the questions raised in the case were not finally determined by the Vice-Chancellor. They were only considered so far as it was necessary to decide the question of granting an injunction preliminary to the hearing.

Upon the facts found in the case before us, we see no reason to doubt that the vote of the majority of the stockholders, for the sale of the corporate property and the closing of the business of the corporation, was justified by the condition of their affairs. Without available capital, and without the means of procuring it, the further prosecution of their business would be unprofitable, if not impracticable. Under these circumstances it was in furtherance of the purposes of the corporation to pay their debts, close their affairs, and settle with their stockholders on terms most advantageous to them. *Sargent v. Webster*, 13 Met. 504.—*Bigelow, J.*, *Treadwell v. Salisbury Manufacturing Company*, 7 Gray, 393, 404-405.—*Ed.*

those duties, is so inconsistent with that purpose, that it cannot be implied, without much clearer expressions of the legislative will looking toward that end, than are to be found in this statute.

The provision of this statute, by which the plaintiff is empowered to contract with other corporations "for the leasing or hiring and transfer to them, or any of them," of its "railway cars and other personal property," is fully satisfied by construing it as confirming the plaintiff's right to do as it had been doing, to "lease" or "hire" (which are equivalent words) to other corporations in the regular course of its business, and to "transfer" under such leasing or hiring, its "railway cars," and "other personal property," either connected with the cars, or at least of the same general nature of tangible property. It can hardly be stretched to warrant the plaintiff in making to a single corporation an absolute transfer, or a long lease, of all that might be comprehended in the words "personal property" in their widest sense, including not only goods and chattels, but moneys, credits and rights of action. In any view, it would be inconsistent alike with the main purpose of the statute, and with the uniform course of decision in this court, to construe these words as authorizing the plaintiff to deprive itself, either absolutely, or for a long period of time, of the right to exercise the franchise granted to it by the legislature for the accommodation of the public.¹

By the contract between these parties, as expressed in the in-

¹ It is argued that because a corporation has authority to put an end to its existence by a vote of the majority of its stockholders, in which event it may proceed to settle up its affairs, *dispose of its property*, and divide its capital stock, therefore, a corporation in full operation, with no such purpose of terminating its existence, may, in the ordinary course of its business, sell all of its property, real and personal, and if it be a railroad company, dispose of its road, its franchises, and the powers necessary to properly carry on the business of a carrier. It is insisted that if it can do this, it may, therefore, make a lease of such property and franchises, transferring all those powers, rights, and privileges.

But it does not need argument to show that such provision, made for the dissolution of a corporation by the voluntary act of its incorporators, providing for the disposition of its property when the resolution to that effect has been adopted, whether by distribution of dividends on its profits or the sale of shares of stock, or for any other disposition of its effects compatible with law, is not applicable to and cannot be intended to confer upon corporations continuing in existence, or which, like these companies, contemplate in the very contract entered into a continuance of more than ninety-six years, the power to dispose of their corporate powers and franchises, much less the authority to lease them for an indefinite period to others.

In the case before us both corporations continued to exist; they both entered into contracts covering a period of ninety-six years; and if the contract of lease be valid, one of them obtained thereby the right to the control and use of the property and franchises of the other, which on its

indenture sued on, are transferred all cars already constructed, all existing contracts with railroad companies for running cars, all existing patent rights under which other cars might be constructed, and all other personal property, moneys, credits, and rights of action of the plaintiff. But after the cars and the railroad contracts may have ceased to exist, and after all those patent rights must have expired, the indenture is still to continue in force for the full term of ninety-nine years, unless sooner terminated as therein provided. In addition to all this, the plaintiff covenants, in the most express and positive terms, never to "engage in the business of manufacturing, using or hiring sleeping cars" while the indenture remains in force. In short, the plaintiff not only parts with all its means of carrying on the business, and of performing the duty, for which it had been chartered, of transporting passengers and making and letting cars to transport them in; but it undertakes to transfer, for ninety-nine years, nearly co-extensive with the duration of its own corporate existence, the whole conduct of its business, and the performance of all its public duties, to another corporation; and to continue in existence, during that period, for no other purpose than that of receiving, from time to time, from the other corporation, the stipulated rent or compensation, and of making dividends out of the moneys so received.

Considering the long term of the indenture, the perishable nature of the property transferred, the large sums to be paid quarterly by the defendant by way of compensation, its assumption of the plaintiff's debts, and the frank avowal, in the indenture itself, of the intention of the two corporations to prevent competition and to create a monopoly, there can be no doubt that the chief consideration for the sums to be paid by the defendant was the plaintiff's covenant not to engage in the business of manufacturing, using or hiring sleeping cars; and that the real purpose of the transaction was, under the guise of a lease of personal property, to transfer to the defendant nearly the whole corporate franchise of the plaintiff, and to continue the plaintiff's existence for the single purpose of receiving compensation for not performing its duties.

The necessary conclusion from these premises is, that the contract sued on was unlawful and void, because it was beyond the part became bound for the payment of rent therefor, a supposed profit on the capital for the entire period of the term. We can see no reason why the powers conferred upon a corporation going out of existence, and dissolved by its own act, including the right to wind up its affairs and dispose of its property, can be held to confer any such power on a company which contemplates an existence of a hundred years to come. *Miller, J., Oregon Railway Co. v. Oregonian Railway Co.*, 130 U. S. 1, 34-35.—Ed.

powers conferred upon the plaintiff by the legislature, and because it involved an abandonment by the plaintiff of its duty to the public.

There is strong ground, also, for holding that the contract between the parties is void, because in unreasonable restraint of trade, and therefore contrary to public policy. Of the cases cited by the plaintiff upon this point, those which have most resemblance to the present case are quite distinguishable.¹

The contract sued on being clearly beyond the powers of the plaintiff corporation, it is unnecessary to determine whether it is also *ultra vires* of the defendant, because, in order to bind either party, it must be within the corporate powers of both. *Thomas v. Railroad Co.*, *Pennsylvania Railroad v. St. Louis, etc., Railroad*, and *Oregon Railway v. Oregonian Railway*, above cited.

It was argued in behalf of the plaintiff that, even if the contract sued on was void, because *ultra vires* and against public policy, yet that, having been fully performed on the part of the plaintiff, and the benefits of it received by the defendant, for the period covered by the declaration, the defendant was estopped to set up the invalidity of the contract as a defense to this action to recover the compensation agreed on for that period.²

But this argument, though sustained by decisions in some of the States, finds no support in the judgments of this court.³

The view which this court has taken of the question presented by this branch of the case, and the only view which appears to us consistent with legal principles, is as follows:

A contract of a corporation, which is *ultra vires*, in the proper sense, that is to say, outside the object of its creation as defined in the law of its organization, and therefore beyond the powers conferred upon it by the legislature, is not voidable only, but wholly void, and of no legal effect. The objection to the contract is not merely that the corporation ought not to have made it, but that it could not make it. The contract cannot be ratified by either party, because it could not have been authorized by either. No performance on either side can give the unlawful contract any validity, or be the foundation of any right of action upon it.

When a corporation is acting within the general scope of the powers conferred upon it by the legislature, the corporation, as well as persons contracting with it, may be estopped to deny that

¹ So much of the opinion as relates to this question has been omitted.—Ed.

² So much of the opinion as relates to this question should be considered in connection with the cases *infra*, pp. —Ed.

³ A portion of the opinion containing a review of the cases on this question has been omitted.—Ed.

it has complied with the legal formalities which are prerequisites to its existence or to its action, because such requisites might in fact have been complied with. But when the contract is beyond the powers conferred upon it by existing laws, neither the corporation, nor the other party to the contract, can be estopped, by assenting to it, or by acting upon it, to show that it was prohibited by those laws.

The doctrine of the common law, by which a tenant of real estate is estopped to deny his landlord's title, has never been considered by this court as applicable to leases by railroad corporations of their roads and franchises. It certainly has no bearing upon the question whether this defendant may set up that the lease sued on, which is not of real estate, but of personal property, and which includes, as inseparable from the other property transferred, the inalienable franchise of the plaintiff is unlawful and void for want of legal capacity in the plaintiff to make it.

A contract *ultra vires* being unlawful and void not because it is in itself immoral, but because the corporation, by the law of its creation, is incapable of making it, the courts, while refusing to maintain any action upon the unlawful contract, have always striven to do justice between the parties, so far as could be done consistently with adherence to law, by permitting property or money, parted with on the faith of the unlawful contract, to be recovered back, or compensation to be made for it.

In such case, however, the action is not maintained upon the unlawful contract, nor according to its terms; but on an implied contract of the defendant to return, or, failing to do that, to make compensation for, property or money which it has no right to retain. To maintain such an action is not to affirm, but to disaffirm the unlawful contract.

The ground and the limits of the rule concerning the remedy, in the case of a contract *ultra vires*, which has been partly performed, and under which property has passed, can hardly be summed up better than they were by Miller J., in a passage already quoted, where he said that the rule "stands upon the broad ground that the contract itself is void, and that nothing which has been done under it, nor the action of the court, can infuse any vitality into it;" and that "where the parties have so far acted under such a contract that they cannot be restored to their original condition, the court inquires if relief can be given independently of the contract, or whether it will refuse to interfere as the matter stands." *Pennsylvania Railroad v. St. Louis, etc., Railroad*, 118 U. S. 317.

Whether this plaintiff could maintain any action against this defendant, in the nature of a *quantum meruit*, or otherwise, independently of the contract, need not be considered, because it is

not presented by this record, and has not been argued. This action, according to the declaration and the evidence, was brought and prosecuted for the single purpose of recovering sums which the defendant had agreed to pay by the unlawful contract, and which, for the reasons and upon the authorities above cited, the defendant is not liable for.

Judgment affirmed.

BROWN, J., not having been a member of the court when this case was argued, took no part in its decision.

THE PEOPLE OF THE STATE OF NEW YORK, APPELLANT, *v.* WILLIAM J. H. BALLARD *et al.*, RESPONDENTS.

IN THE COURT OF APPEALS OF NEW YORK, SECOND DIVISION,
OCTOBER 1, 1892.

[Reported in 134 *New York Reports* 269.]

(ARGUED January 13, 1891; reargument ordered June 9, 1891, and case remitted to second division for reargument. Reargued May 31, 1892; decided October 1, 1892.)

Appeal from judgment of the General Term of the Supreme Court, in the First Judicial Department, enforced upon an order made February 14, 1890, which affirmed a judgment in favor of defendants entered upon a decision of the court on trial at Special Term.

This action was brought in the name of the people without a relator, against a domestic business corporation and its trustees, to compel the latter to account for their official conduct in the management and disposition of its property; to require them to pay over to it the value of all property acquired by themselves, transferred to others, lost or wasted by a violation of duty on their part, and to remove each of them from his position as trustee of the company.

The facts, so far as material, appear in the opinion.

J. Langdon Ward for appellant.

Treadwell Cleveland for respondents.

VANN, J. In 1880, the Spring Valley Hydraulic Gold Co. was organized as a corporation under the General Manufacturing Act of this State, and shortly thereafter it invested substantially all its capital in certain mines in the State of California, and until the year 1886 operated the same as its sole business. The object for which it was formed, as stated in the certificate of incorporation,

was to carry on the business of mining various precious ores and to smelt, refine and sell the product.

In July, 1886, the defendant trustees transferred all its property, both real and personal, including said mines, to a corporation organized at the time under the laws of the State of California, for the purpose of carrying on the business theretofore conducted by the defendant company and of taking title to its assets. This was done with the approval of stockholders holding a majority of the stock, in good faith, to save the property from sacrifice, but without the consent of the holders of a large number of shares and against the protest of some of the stockholders. The sole consideration for such transfer was an agreement by the California company to pay the debts of the New York company and to issue to it certain shares of its capital stock. A majority of the directors of the former company were, and still are, residents of California, and the only object of the transaction was, without a dissolution, to reorganize the defendant company under the laws of another State, in order to obtain some real or supposed advantage afforded thereby. The Attorney-General commenced this action to remove the trustees and to compel them to account for the property thus transferred, but the Special Term dismissed the complaint because no one was joined as a relator and the General Term affirmed the judgment, one of its learned justices dissenting.

This appeal presents two questions of great importance:

1. Whether an action for the judicial supervision of a business corporation, its officers and members, can be maintained by the Attorney-General in the name of the people without a relator. *People v. Lowe*, 47 Hun, 577; *People v. Bruff*, 9 Abb. (N. C.) 153.

2. Whether a corporation created by the laws of this State can be reorganized under the laws of another State without the process of lawful dissolution.¹

A corporation is purely artificial, having no natural or inherent power, but only such as its charter confers. The charter of the corporation in question was the statute under which it was organized. Upon filing the certificate of incorporation it came into existence with power to do only that which is expressly or impliedly authorized by the statute. It had no power to act except through its trustees, who were authorized to manage its "stock, property and concerns," and a majority of whom were required to be citizens of this State. Laws of 1848, c. 40, as amended by Laws of 1869, c. 269. While they were authorized to conduct its affairs, they were not authorized to terminate its existence, although, under special circumstances, the courts could dissolve it upon their

¹ Only so much of the opinion is given as relates to this question.—Ed.

der application. Code of Civ. Pro. § 2419. A corporation cannot cease to exist of its own will. Its life continues until either the charter period has expired or the court has decreed a dissolution. The law made it and the law only can put an end to it. As it cannot take its own life directly, it cannot do so indirectly, for that would be a fraud upon the law and against public policy. By the transaction complained of the defendant company was stripped of all its property, and thus prevented from going on in business and deprived of all means of carrying into effect the object of its existence. While a corporation may sell its property to pay debts, or to carry on its business, it cannot sell its property in order to deprive itself of existence. It cannot sell all its property to a foreign corporation organized through its procurement, with a majority of non-resident trustees, for the express purpose of stepping into its shoes, taking all its assets and carrying on its business. That would be the practical destruction of the corporation by its own act, which the law will not tolerate. Whether the process by which it was sought to convert the New York corporation into a California corporation is called reorganization, consolidation or amalgamation, it was the exercise of a power not delegated and was void. It was corporate burial in New York for resurrection in California. While the stockholders who consented may be estopped by their acts, those who did not consent can take advantage of this violation of their rights, and in the State of New York can demand that those who did the wrong shall make restitution.

The case of *Abbott v. American Hard Rubber Co.*, 33 Barb. 578, is the leading authority upon the subject in this State, and it is also recognized as the leading authority in most of the States. In that case a majority of the trustees of a business corporation, without the consent of some of the stockholders, transferred all its personal property, which was especially adapted to its business, to two persons, who forthwith caused another corporation to be formed, and transferred such property to it. It was held that, as such transfer practically terminated the corporation by taking from it the power to fulfil the object of its organization, it was a violation of that object, was not within the power of the trustees, and was hence void as *ultra vires*. The case was elaborately considered both at General and Special Term, and we regard it as a sound and valuable authority.

A somewhat similar question was under consideration in *Frothingham v. Barney*, 6 Hun, 366, where the court said: "This, as a business arrangement, was wise, discreet and sagacious. As such it should be sustained if it legally is possible. The interests of one or two small stockholders should not enable them to work the destruction of the interests of co-owners, or compel the

purchase of their stock at fictitious or unreal prices, if it can be avoided. . . . Upon the dissolution of the association, it became the duty of the trustees to convert the assets into money and distribute the proceeds among the stockholders. To a certain extent this has been done. A portion of such assets has not been distributed, and another portion, including the good will of the old association, has been exchanged by the trustees for the corporate stock of a new Wells, Fargo & Co. This, as I understand, the trustees had no right to do. They had no right to exchange the assets of the old association for the corporate stock of any corporation without the consent of all the stockholders. *Mann v. Butler*, 2 Barb. c. 362. Equally were they without authority in making this partial exchange without such consent. Stockholders of the old association could not thus, against their will, be forced into relations with the new company. *Blatchford v. Ross*, 54 Barb. 42; *H. & N. H. R. R. Co. v. Croswell*, 5 Hill, 383, 386."

In *Taylor v. Earle*, 8 Hun, 1, a New York corporation, by the vote of a large majority of its stockholders, sold all its property, except cash on hand, mills and franchises, to a Vermont corporation and took in payment shares of stock in the latter company. The court said: "The whole scheme of the transfer and its execution was illegal. There is no power given by the acts under which the Burlington Cotton Mills (the New York corporation) was incorporated to transfer all its property and thus terminate its existence, and take in payment stock in a company carrying on the same business with a different name, charter and stockholders, and being a foreign corporation. The corporation, by the New York law, could increase or diminish its stock, or extend its business to other objects, but that falls far short, I think, of the sweeping power exercised on this occasion. The sale was not real. It was a mere form to turn a New York corporation into a Vermont one, and thus escape the scrutiny into the affairs of the company permitted by the New York law to the stockholders."

All the authorities in this State are uniform in holding that the trustees of a corporation cannot so dispose of its property as to virtually end its existence and prevent it from carrying on the business for which it was incorporated. *Blatchford v. Ross*, 54 Barb. 42; *Copeland v. Citizens' Gas Light Co.*, 61 *id.* 60; *Smith v. N. Y. Consolidated Stage Co.*, 18 Abb. Pr. 419; *Metropolitan El. Ry. Co. v. Manhattan Ry. Co.*, 14 Abb. (N. C.) 303; *Hartford, etc., R. R. Co. v. Croswell*, 5 Hill, 383.

Other courts of the highest standing have laid down the same rule. *Railway Co. v. Allerton*, 85 U. S. 233; *Stevens v. Rutland, etc., R. R. Co.*, 29 Vt. 545; *New Orleans, etc., R. R. Co. v. Harris*, 27 Miss. 517; see, also, *Morawetz on Corporations*, § 413; *Spell-*

(ing on Corporations, § 1012; Cook on Stock and Corporation Law, § 667; Beach on Corporations, §§ 358, 430.

The fact that the trustees acted in good faith did not empower them to do an illegal act; and the fact that there may be some difficulty in the final adjustment of rights, because some of the stockholders consented, while others did not, constitutes no defense to the action. We see no greater difficulty, however, than would exist if the action were brought by a trustee who had not consented to the act complained of, and no reason why "the liability of the trustees to account" should not be "limited to those stockholders who have not assented to the transfer."

We think that the transfer was unauthorized and void as to the non-assenting stockholders, and as to the State, and that the people can maintain the action in the name of sovereignty.

The judgment should, therefore, be reversed and a new trial granted, with costs to abide event.

All concur with VANN, J., except BROWN and LANDON, JJ., dissenting.¹

Judgment reversed.²

¹ The dissenting opinion of Landon, J., has been omitted.—Ed.

² A motion for reargument was submitted October 17, 1892, and denied November 29, 1892, in the following *per curiam* opinion:

"Upon the first argument of this appeal one member of the court was disqualified from sitting, and the remaining judges were equally divided upon the question whether an action of this character can be maintained by the Attorney-General in the name of the people. The case was thereupon transferred to the Second Division, where it was again argued and a decision handed down on October 1, 1892, contemporaneously with the dissolution of that branch of the court. It was there held by a divided court that the action in its present form was maintainable, and the judgment of the General Term affirming the judgment of the Special Term, which dismissed the plaintiff's complaint, was reversed and a new trial ordered upon the ground that the trustees of a mining company incorporated under the act of 1848 cannot, even with the consent of a majority of its stockholders, transfer all of its property and assets to another corporation avowedly incorporated for the purpose of acquiring the same and carrying on its business, and receive in payment therefor the stock of the latter corporation.

"It appears that the purchasing company is a foreign corporation, but we do not understand that it is claimed the case would be different if it were a domestic one. Upon the transfer the purchasing corporation assumed all the debts of the defendant corporation, and it is conceded that the defendant corporation has virtually abdicated its franchises and placed itself in a position where it is and will be unable to carry on the business for which it was incorporated.

"The defendants now move for a reargument, and their counsel, with commendable candor, concede that under the rules which prevail in this court, and which control the determination of such motions, all discussion is foreclosed of the question of the maintainability of this action by the people, and also of the question that the directors of a domestic corpora-

UNION PACIFIC RAILWAY CO. *et al.* v. CHICAGO, ROCK ISLAND & PACIFIC RAILWAY CO.

IN THE CIRCUIT COURT OF APPEALS OF THE UNITED STATES,
EIGHTH CIRCUIT, JULY 19, 1892.

[Reported in 51 *Federal Reporter* 309.]

APPEAL from the Circuit Court of the United States for the District of Nebraska. Affirmed.

John M. Thurston and *A. L. Williams* (*John F. Dillon*, of counsel) for appellants.

Thomas F. Withrow and *J. M. Woolworth* (*A. J. Poppleton*,

tion which is engaged in a profitable business cannot, without the assent of all the stockholders, close out its business; transfer its entire property to another corporation; pay its debts; distribute its remaining assets among its stockholders, and surrender its franchise to the State. But it is contended that the rule is otherwise with respect to a non-paying corporation, and that the trustees of such a company, when they find the business to be unprofitable, and it is shown that it cannot be run except at a loss, have the right and that it is perhaps their duty to suspend the business of the corporation, dispose of its property, and wind up its affairs, if the majority of the stockholders consent thereto, and that an action will not lie against them under secs. 1781, 1782 of the Code for mismanagement, or an abuse of trust, or for an unlawful application of the corporate funds, if they in good faith adopt such a course. In support of this position the defendants' counsel cite the decision of the Second Division in the case of *Skinner, as Trustee, v. Smith et al.*, handed down at the same time with the decision in the present case, in which the learned chief judge of that division, in concluding his opinion, says: 'The right of a manufacturing company to discontinue its operations when they have become unprofitable for the purpose of protecting shareholders from further loss, does not admit, we think, of doubt;' and several cases are cited, but none in the courts of this State, and we find no other expression on the subject, except a dictum of the present chief judge of this court, in *Denike v. N. Y. & R. Lime and Cement Co.*, 80 N. Y. 606, where he says: 'All the stockholders uniting might undoubtedly surrender the franchises of a corporation and work its dissolution.' The query, however, is added, 'But can a portion of them do this in the absence of statutory authority?'

"It is insisted that there is a plain distinction in this respect between the case of a business corporation, which has the means or the ability to carry on its business at a profit, and the case of such a corporation having no public duties or functions to perform, which finds itself unable, from no fault on the part of its managers, to conduct its business without loss, and that the court in disposing of this appeal overlooked this distinction, and hence the propriety of this motion for a reargument.

"Where such a motion is addressed to a court, differently constituted from the one which decided the appeal, but possessed of co-ordinate authority, as it is in the present case, it must be obvious that there are difficulties and embarrassments in the way of its disposition, which would not exist if a rehearing was sought in the same tribunal where the decision complained of was made. We are not prepared to say that the distinction

M. A. Low, John W. Cary and John T. Fish, of counsel) for appellees.

Before CALDWELL and SANBORN, Circuit Judges, and SHIRAS, District Judge.

SANBORN, Cir. J., after stating the facts as above, delivered the opinion of the court.¹

The principal question in this case is whether this contract of May 1, 1890, is *ultra vires* of the Pacific Company. The Union Pacific Railway Co. is a consolidation, under authority of the act of Congress of July 1, 1862, of the Union Pacific Railroad Co., the Kansas Pacific Railway Co., and the Denver Pacific Railway & Telegraph Co. It has succeeded to all the rights and powers granted to the Union Pacific Railroad Co. by the acts of Congress of July 1, 1862 (12 St. at Large, p. 489), July 2, 1864 (13 St. at Large, pp. 356, 362), February 24, 1871 (16 St. at Large, p. 430), and the various acts amendatory thereof; and in determining the extent of its powers and the validity of this contract these acts of Congress must be read in the light of any general legislation fairly applicable. *Central Transp. Co. v. Pullman's Palace Car Co.*, 139 U. S. 24, 48, 11 Sup. Ct. Rep. 478. It is conceded that the powers thus granted, together with those fairly incidental thereto, are the only powers of this corporation, and that all powers not thus granted are reserved to the State. Corporations created under statutory authority are the creatures of the statute. By it their powers are measured. Beyond the limits of the powers there granted, and those fairly incidental thereto, they may not act; they may not agree to act. Their contracts for the just exercise of these powers are binding and enforceable; but their contracts beyond the scope of these granted powers are null—are as though they had not been. They are void as against the State, because they are unlawful usurpations of powers reserved by the State. They are void as against other parties to the contracts,

which the defendants rely upon does not exist, and it may be that if the attention of the court which decided this appeal could be specially called to the point, if it was not in fact done upon the argument, the distinction would be recognized and the appropriate relief granted. But we deem it unnecessary for the proper preservation of the defendants' rights to express or intimate any opinion on the subject. A new trial has been ordered. The question can now be distinctly and specifically raised in the court below, and if the decision there is adverse to the defendants, a new appeal will bring it here in such a form that it can be heard and disposed of by this court as if it were *res nova*, provided it turns out, as the defendants contend, that it was not considered and distinctly decided upon the present appeal.

"The motion for a reargument is, therefore, denied, but without costs."
—ED.

¹ The statement of facts has been omitted.—ED.

because they are bound to take notice of the law, of the limits of corporate powers there found; and no formal assent of corporations or officers, no alleged estoppel, can give validity to such contracts, or induce the courts to enforce them, against the objection of the citizen or the State.

Another settled proposition is that the consideration derived by the State from the grant of a railroad franchise is the performance of the functions pertaining to the exercise of the powers so granted. So far as the State and the public are concerned, the sole purpose of the grant is to obtain from the corporation a performance of these functions and a proper exercise of these powers; hence any contract or conveyance of the corporation by which, without legislative authority, it disables itself from the performance of these functions and from the exercise of its corporate powers is against public policy and void. Such a corporation may not accept the privilege and benefit without accepting the burden and duty imposed by the franchise. It may not absolve itself from the performance of those duties to the public whose performance is the only remuneration to the State for the franchise granted. *Thomas v. Railroad Co.*, 101 U. S. 71; *Pennsylvania R. Co. v. St. Louis, etc., R. Co.*, 118 U. S. 290, 6 Sup. Ct. Rep. 1094; *Oregon Ry. & Nav. Co. v. Oregonian Ry. Co.*, 130 U. S. 1, 9 Sup. Ct. Rep. 409; *Central Transp. Co. v. Pullman's Palace Car Co.*, 139 U. S. 24, 11 Sup. Ct. Rep. 478.

Upon these principles and authorities is based the contention that this contract is void.¹ The clause of the contract deemed most obnoxious is that which lets the Rock Island Co. into the equal joint possession and use of the two main tracks of the Pacific Company, between Council Bluffs and South Omaha for 999 years, and it is argued that by this contract the Pacific Company has attempted to abandon or alienate a part of its franchise, and that this attempt avoids this contract. Let us examine these authorities, and see if they warrant this conclusion.²

It is idle to review the authorities referred to in these decisions in support of this proposition, or the cases involving the telegraph franchises of the Pacific Company, to which reference is made by counsel. It is sufficient to say that in every case to which the learning and research of counsel has been able to refer us, where such a contract has been held void, an attempt was made to transfer absolutely, or for a long term of years, either the entire property and franchises of the corporation, or so large and substantial a part of them that it disabled the corporation from the performance of its obligations and duties to the Government and to the public.

¹ Only so much of the opinion is given as relates to this question.—Ed.

Clearly, the contract here in question does not come under the ban of these decisions. So far as the main line of the Pacific Company's road from Council Bluffs to Ogden is concerned, this contract covers but about seven miles of double track on a line of 1032 miles, part of a system of over 5000 miles of railroad operated by this company. These tracks are at one of its terminals, at the junction of three great systems of railroad, aggregating more than 14,000 miles in extent, at the crossing of the Missouri river, where three large cities stand. Courts cannot be blind to the fact that every railroad company cannot have entrance to our great cities over tracks of its own, or to the fact that railroad companies do, and every public interest requires that they should, make proper contracts for terminal facilities over the roads of each other.

The provision in this contract that schedules of rules for the movement of engines and trains shall be made by the parties which will accord equal rights and privileges to the trains of the same class belonging to each party, and if not agreed upon, shall be fixed by referees, disables the Pacific Company from the exercise of no power necessary to the discharge of its public duties. It is but the usual and necessary provision commonly found in contracts for terminal facilities. The same provision requires such rules and regulations to be "reasonable and just," and this puts their determination peculiarly within the province of a court of equity, where injustice will not be done. *Joy v. City of St. Louis*, 138 U. S. 43, 11 Sup. Ct. Rep. 243; *Brown v. Bellows*, 4 Pick. 189; *Gregory v. Mighell*, 18 Ves. 328; *City of Providence v. St. John's Lodge*, 2 R. I. 46, 57; *Dike v. Greene*, 4 R. I. 285. Only about one-seventh of the capacity of these tracks was used in 1891, and the full performance of both contracts will not now exhaust their capacity or deprive the Pacific Company of any facility necessary for the discharge of its duties to the Government or the public; nor will the speculative possibility that at some future day the full performance of these contracts may wrong some one prevail upon this court to do injustice to either party now. It is by no means clear that the tolls of the Pacific Company between Council Bluffs and South Omaha will be diminished any more by the performance of this contract than they would be by the operation by the Rock Island Company of a parallel railroad of its own construction between those cities; while it is certain that the Pacific Company will receive under the two contracts \$90,000 per annum that it would not obtain in that event. That the term of the contract is long might weigh as an objection if it was vicious or hurtful in itself, but if it is fair to the parties and beneficial to the public interests, its length is but an added argument in its

favor. By this contract the Pacific Company does not surrender or transfer any part of its road or property; on the other hand, it retains their possession, and reserves to itself, by the express terms of the contract, the absolute control, through its own superintendent, of the operation of every train of every company that enters upon these tracks.

That the Pacific Railway Co. Acts reserved to the Government the preference in the use of this railroad is not material to this discussion, for two reasons: That if the entire use of the Pacific Company was subject to this charter provision, the joint and equal use, which alone that company lets, must be; and that the record satisfies us that with the contracts in operation the Pacific Company still retains every facility necessary to the discharge of its corporate obligations to the Government and all its other patrons.

That these acts require the Pacific Company to maintain and operate the Omaha bridge as a part of a continuous line of railroad from Council Bluffs to Ogden cannot be material to the determination of this question, because this contract does not deprive it of that power; and it cannot be successfully contended that, after the through traffic upon this continuous line is fully accommodated, it has not also authority to use this bridge or any other part of its line for local traffic.

The Pacific Company, in its answer, offered to transport all the cars and trains of the Rock Island Company to and from all points on its lines described in the contract, and alleged that it "thereby enabled the complainant to maintain its business at Omaha and South Omaha, and to carry on exactly the same business that it could have carried on by the operation of its own trains, by its own engines, and by its own employees, as provided in said supposed contract." This would seem to reduce the contention to this: That permitting the use of these tracks of this railroad for the traction of the trains of the Rock Island Company by its own engines is an unlawful alienation of a part of the Pacific Company's franchise; but permitting the use of the tracks, crews, and engines of the Pacific Company for the traction of the same trains is a lawful exercise of its powers. The truth is—and the absurdity of this position well illustrates it—that by this contract no part of the franchise is transferred or attempted so to be; the Pacific Company still retains and exercises the power to operate its trains and collect its tolls between Council Bluffs and South Omaha to the same extent as before the contract was made. The franchise to operate its trains and collect its tolls between these points, which the Rock Island Company exercises, is derived, not from the Pacific Company, but from the State. It had this power before the contract; it might have exercised it on a parallel rail-

road built by itself ; being allowed the use of the Pacific Company's tracks, it exercises it on those tracks.

The general proposition that a railroad corporation must itself exercise its powers and perform its public duties is sound in principle and settled by authority ; but this rule does not require it to do every act itself that it can lawfully do, or prohibit it, after the full performance of those duties, from utilizing all the surplus property it has necessarily acquired for the purposes of its incorporation. Thus it is within the powers of this corporation to build its own cars and engines, but it is not required so to do ; it may hire them built ; it may buy them ; it may rent them. It is within its powers to sell all its tickets, make all its contracts for freightage, and collect all its tolls itself, but it is not required so to do ; and it is equally within its powers to delegate to other corporations or parties the right to make these contracts. It was undoubtedly within the powers of this corporation in this case to permit the use of its engines, crews, and tracks to the Rock Island Company for the transportation of its trains over these tracks ; but it was equally within those powers to permit the use of these tracks for the transfer of the same trains when propelled by the engines of the Rock Island Company. In which way in this case these powers should be exercised was left to the determination of the managers of the corporation. It was a mere question of method, not of authority, and whether in this case these managers have determined this question wisely or not is not material to the determination of the question we are now considering.

If, in the conduct of its corporate business, a railroad corporation necessarily acquires engines and cars that at certain seasons of the year are not required for its own use, it is not then required to operate them ; it is not required to hold them in idleness ; it may rent them ; it may sell them ; and, if it necessarily constructs or acquires for its corporate purposes bridges, tracks, and depots at its terminals whose capacity is greater than its corporate use, the interest of its stockholders and creditors, the value of whose property will be thereby enhanced, and the interest of the public, who will be thereby provided with increased facilities for transportation, alike require that such surplus use shall not be left to idle waste. *Brown v. Winnisimmet Co.*, 11 Allen, 326, 334 ; *Midland R. Co. v. Great Western R. Co.*, 8 Ch. App. 841, 851 ; *Simpson v. Hotel Co.*, 8 H. L. Cas. 712 ; *Hendee v. Pinkerton*, 96 Mass. 381, 386. // The result is that it is not beyond the powers of a corporation authorized to construct, maintain, and operate a railroad and its appurtenances to let by contract to a like corporation its surplus rolling stock, or the surplus use of its terminal tracks, depots, and bridges, which it has

necessarily acquired for the purposes of its incorporation; provided, always, that such contract in no way disables it from the full performance of its obligations and duties to the State and the public. The contract here in question is clearly within this rule, and is not *ultra vires* of the Pacific Company.

The contract was within the corporate powers of each of the parties to it; each of them by its own acts became legally bound to perform it; the powers of the court below were ample to enforce it; those powers were wisely exercised in granting its decree; and that decree is hereby affirmed with costs.¹

BRUNSWICK GAS LIGHT CO. v. UNITED GAS, FUEL,
AND LIGHT CO.

IN THE SUPREME JUDICIAL COURT OF MAINE, AUGUST 11, 1893.

[Reported in 85 Maine Reports 532.]

THIS was an action of covenant broken to recover damages for breach of the covenants in a lease. The case was tried by the justice of the Superior Court for Cumberland County, without the intervention of a jury, subject to exceptions in matters of law. From the bill of exceptions it appeared that the plaintiff was incorporated by special act of the legislature, in 1854, to carry on the manufacture, distribution, and sale of gas for street lighting, the laying of pipes in streets, etc.

The defendant was incorporated under the general laws of Maine in 1888; and its purposes, under the articles of association, were to operate "a gas process for manufacturing fuel and illuminating gas from oil and other raw products; to light by gas the streets, parks, grounds, buildings, and business places of persons and corporations; to manufacture, use, supply, distribute, and furnish light, heat, and motive power by gas for heating and manufacturing purposes deemed for the interest of the corporation; to erect and maintain posts and other fixtures, to lay down and maintain such underground pipes and other appurtenances as may be deemed necessary for the objects of the corporation, wherever the same may be lawfully done; to manufacture, lease, purchase, and otherwise acquire, deal in, manage, use, and sell any and all machinery, fixtures, appurtenances, appliances, and plants for using and furnishing light, heat, and power and for any and all purposes for which gas is now used or may hereafter be used; to

¹ Affirmed on appeal, 163 U. S. 564.—ED.

lease, purchase, or otherwise acquire, manage, control, use, and sell real and personal estate, patents, patent rights, inventions, and processes, and improvements thereon, and interests therein, and rights thereunder, and any and all other property, privileges and easements, rights, and things whatsoever deemed necessary or convenient for carrying on the business of the corporation, with power to authorize other corporations and persons to manufacture, use, sell, and operate thereunder, and to do any and all acts and things connected with or deemed necessary for carrying on the business of the corporation and the general business of furnishing and supplying heat, light, and power by means of gas; to issue bonds secured by mortgage on the property and franchise of said company for the purpose of raising money for the use of the company; and to have and exercise all the rights and powers and privileges appertaining to corporations under the general laws of the State of Maine."

For several years prior to April, 1889, the plaintiff corporation under its charter had supplied the citizens of Brunswick with gas. Its operations had not been financially successful. At that time it was heavily in debt, not only on account of bonds which it had issued, secured by a mortgage on its real estate and other property, but a considerable floating debt existed as well. Some of the bonds at that time were overdue, and the holders were threatening foreclosure. At this time B. G. Dennison was the president of the Brunswick Gas Light Co., and Marcus R. Williams was president of the United Gas, Fuel, and Light Co.

At the time of the execution of the lease of the Brunswick property, all the directors of the defendant company, including its president, were residents of New York City and its vicinity.

This defendant was the owner of what is known as the Avery process for the manufacture of gas. Not long after the election of these directors, President Williams came to Maine for the purpose of introducing that process in this State.

For some time prior to said first day of April, negotiations had been pending between these two officers relating to a lease of the plaintiff's property by the defendant company, the defendant company prior to this time having entered into possession of the gas plant in Bath, under some kind of an arrangement with the company originally operating the Bath plant. These negotiations terminated on the 1st day of April, 1889, by the execution of a lease.

Under this lease and on the day of its execution, the defendant company entered into possession of the plaintiff's gas plant at Brunswick.

The case does not show that, prior to the execution of the lease

the directors of the defendant company expressly authorized by formal vote their president, Williams, to execute the lease in their behalf. The defendant company at the trial denied the authority of Williams to execute the lease of the Brunswick plant, but it appeared as facts in the case that the works at Brunswick and at Bath, which the defendant company admitted were operated by its authority, had a common manager, whose salary was not apportioned between them, kept common books of account and bought supplies in common. And further, that both works at times used the Avery process for the manufacture of gas which the defendant company alone had the right to use.

From these facts and other testimony in the case the court found that Williams was the agent of the defendant company to arrange with different gas companies in the State for the introduction of the Avery process; that the directors of the defendant company had full knowledge that the works at Brunswick were operated by their company; that they acquiesced in the same and ratified the action of Williams in the premises—no disavowal of the authority of President Williams to execute the Brunswick lease ever having been communicated to the plaintiff company prior to the commencement of this suit.

The defendant company continued to operate the Brunswick works until September 15, 1890, when voluntarily, and without the fault of the plaintiff company, they abandoned the works and ceased to operate them.

Upon these facts the court ruled as matter of law that the plaintiff company and the defendant company had power to execute the lease in question, and that the defendant company was liable in damages for the breach of the covenants contained in said lease.

The defendant company did not endorse any guaranty upon the outstanding bonds of the plaintiff company, nor did it give any guaranty to the holders of the same further than is contained in the provisions of the lease itself. The damage sustained by the plaintiff on this account is of such an uncertain character that the court allowed the plaintiff nothing for the failure of the defendant to fulfil those covenants contained in the lease.

For prospective damages on account of the breach of covenants of the lease, the court awarded the plaintiff the sum of four thousand five hundred dollars (\$4500) less three hundred dollars, the value of defendant's improvements while in possession, the plaintiff having expressed a willingness to make a deduction equal to the difference between the value of the plant April 1, 1889, when the defendant took possession, and its value September 15, 1890, when it abandoned possession.

After hearing the evidence and arguments of each party, and

considering the same, the court decided that the said indenture is the defendant's deed in manner and form as the plaintiff in its writ has declared against it, and awarded damages in the sum of four thousand nine hundred and eighty-six dollars and fifty-six cents.

Among other provisions the lease contains the following:

"The lessee covenants and agrees to guarantee during the term of this lease the present bonded indebtedness of the lessor, and its renewal, and a further issue of bonds to liquidate any or all of the lessor's existing floating indebtedness. The lessor covenanting on its part not to increase its total indebtedness during the term of this lease and to use all reasonable efforts to pay the same as it matures. And in all bonds of the lessor purchased by the lessee, the lessee shall receive 5 per cent. interest per annum, payable semi-annually, and may deduct said interest from the rent.

"It is further agreed that the said lessor will sell, assign, and transfer the capital stock of said Brunswick Gas Light Co., the par value thereof being fifty dollars (\$50), which stock is to remain at the present amount, twenty thousand dollars (\$20,000), at any time within eight years on the following basis: The said lessee is to pay for said capital stock at the rate of forty dollars (\$40) per share."

The defendant pleaded *non est factum*, with a brief statement, and after judgment took exceptions to this court.

The defense relied upon by the defendant was that the lease was negotiated and executed by an unauthorized agent whose acts were never ratified; that the plaintiff had no legal right to execute the lease, and that in so doing its acts were *ultra vires* and void; that the defendant company had no right to guarantee the bonds, and its agreement to do so was *ultra vires* and void; and that at the termination of the lease there was due the defendant company in set-off, for extensions, improvements and additions, about \$1500.

Barrett Potter for plaintiff.

G. W. Heselton for defendant.

WALTON, J. The question is whether a gas company, which possesses and exercises the right to lay its pipes in the public streets, can sell, lease, or assign its corporate rights and privileges to another gas company, without the consent of the legislature.

We think the question must be answered in the negative. Corporations possessing and exercising the right of eminent domain owe duties to the public from the performance of which they are not allowed to escape by a sale or lease of their franchises, without first obtaining the consent of the legislature. The franchise of a corporation having the right to receive tolls may be levied on to satisfy an execution against the corporation, and in this way it

may be deprived of its corporate powers and privileges. And they may be lost by the foreclosure of a legally executed mortgage. And they may also be lost by laches in reclaiming them when they have been illegally sold, leased, or assigned. But subject to these well-defined exceptions, it is now settled by an overwhelming weight of authority that public or *quasi* public corporations, which possess and exercise the right of eminent domain, or its equivalent, owe duties to the public, as well as to their stockholders; and that they cannot sell or lease their corporate powers and privileges, and thereby disable themselves from performing their public duties, without legislative authority. It is the duty of gas companies, water companies, electric light companies, telegraph and telephone companies, street railway companies, and all similar corporations, which have obtained the right to use the public streets for the erection or extension of their works, to serve the public faithfully and impartially, and at reasonable rates. And this is a duty the performance of which may be enforced by the courts. And one reason why these corporations are not allowed to sell or lease their corporate powers and franchises, without legislative authority is that if they were able to do so, they might thereby disable themselves from the performance of their public duties, and thus escape from the power of the courts and of the legislature to enforce their performance.

But a still more serious objection to the traffic in corporate franchises is the ease with which such a power could be used to create monopolies. By its exercise a single corporation could easily become possessed of the corporate powers and privileges of all its rivals, and thereby annihilate competition and obtain a complete control of the markets. Such combinations are usually hurtful, and sound public policy requires that they be kept under legislative supervision and restraint.

To the argument that similar combinations may be made by individuals, it has been aptly replied that men are mortal, and their combinations short-lived, but corporations are immortal, and their combinations and acquisitions may go on forever; that they may add field to field, wealth to wealth, and power to power, till they become too strong for the Government itself; that all experience shows that such accumulations of wealth and power are dangerous to the public welfare; and that while society can endure the accumulations and combinations of mortals, which must end at the grave, it cannot endure similar accumulations and combinations of power by corporations, which may continue forever.

In a case in New Jersey, decided in August, 1892, it is said that corporations which engage in a *quasi* public occupation, such as

railway, water, gas, telegraph, and similar corporations, are created upon the hypothesis that they will be a public benefit; that they usually possess the right of eminent domain, and not unfrequently the use of the public highways is accorded to them; and that while the State confers upon them these special and extraordinary privileges, it at the same time exacts from them the performance of public duties; that such corporations hold their franchises not merely in trust for the pecuniary profit of their stockholders, but also in trust for the public; and that such corporations cannot lease or otherwise dispose of their franchises needful in the performance of their public duties, without legislative consent. *Stockton v. Central Railroad*, 24 Atl. Rep. 964.

In a case in Illinois decided in 1887, the court held that reason and the weight of authority were in favor of the doctrine that a corporation has no right to sell or lease its franchise, or any property essential to its exercise, which it has acquired under the law of eminent domain, without legislative authority. *Fietsam v. Hay*, 122 Ill. 293; 3 Am. St. Rep. 492.

In another case, decided in 1889, a corporation for the manufacture and sale of gas, having a capital of \$25,000,000, had obtained by purchase a controlling interest in four other gas companies, having an aggregate capital of nearly \$17,000,000; and in the vigorous language of the court, was thus able to destroy the energies of all other corporations of the same kind, and suck the life-blood out of them; and the court held that such a combination could not be tolerated; that the business of manufacturing and distributing illuminating gas by means of pipes laid in the public streets of a city is a business of a public character; that it is the exercise of a franchise belonging to the State; that the services to be rendered for such a grant are of a public nature; and that any unreasonable restraint upon the performance of such duties is prejudicial to the public interests, and in contravention of public policy, and could not be allowed. *People v. Chicago Gas Trust Co.*, 130 Ill., 286; 17 Am. St. Rep. 319.

Equally vigorous is the language of the New York Court of Appeals. In a case relating to the combination known as the Sugar Trust—a trust that included the Forest City Sugar Refining Co., of this State, and so successfully sucked its life-blood out of it that its machinery has since remained as silent as a city of the dead—the court said that corporate grants are always assumed to have been made for the public benefit, and that any conduct which destroys their normal functions, and maims and cripples their separate activity, must affect unfavorably the public interest; and that this is so to a much greater extent when a combination includes and dominates an entire industry, and puts upon the market

a capital stock proudly defiant of actual values, and capable of an unlimited expansion; that it is not a sufficient answer to say that similar results may be lawfully accomplished by an individual having the necessary wealth, for it is one thing for the State to respect the freedom of the citizen, and quite another thing to create artificial persons to aid in promoting such aggregations; that the individuals are few who hold such enormous wealth; but if corporations can combine and mass their forces, a tempting and easy road is opened to enormous combinations, vastly exceeding in strength, and in power over industry, any possibilities of individual ownership. *People v. Sugar Refining Co.*, 121 N. Y. 582 (18 Am. St. Rep. 843).

The law does not assume that all combinations of corporate powers and franchises are necessarily hurtful. It recognizes the fact that they are sometimes beneficial, and provides a way by which they may be lawfully made. But as such combinations are liable to be made for improper purposes and with conditions annexed to them which are inadmissible, sound public policy requires that they be made under legislative supervision and restraint.

In the present case, the Brunswick Gas Light Co. undertook to lease all its property, and all its corporate rights and privileges, to the United Gas, Fuel, and Light Co., for twenty-five years. The latter company took possession of the works and held them for seventeen and a half months, making improvements upon them and paying a portion of the agreed rent. It then abandoned the works, and possession was resumed by the lessors.

This is a suit by the lessors against the lessees for a breach of the covenants contained in the lease. It was contended in defense that the lease was illegal and void and that no recovery could be had upon it. The presiding justice ruled, as a matter of law, that the plaintiff company and the defendant company had power to execute the lease, and that a recovery could be had for a breach of the covenants contained in it. We think the ruling was erroneous. No legislative authority for making the lease was shown, and, without such authority, we think the lease must be regarded as *ultra vires* and void. The authorities bearing upon the question are not in entire harmony; but the weight of authority seems to us to be overwhelmingly in favor of this conclusion. See 2 Beach on Corporations, secs. 831 to 856 inclusive, and the six pages of authorities, *pro* and *con*, cited under the section last cited. The cases are too numerous for citation here, and the few cases to which we have referred will furnish a key to all of them.

But it is claimed that, inasmuch as the defendant company took and held possession of the plaintiff company's works by virtue of the lease, *ultra vires* is no defense to an action to recover the

agreed rent.¹ We do not doubt that the plaintiff company is entitled to recover a reasonable rent for the time the defendant company actually occupied the works; but do not think the amount can be measured by the *ultra vires* agreement. We think that in such cases the recovery must be had upon an implied agreement to pay a reasonable rent; and that while the *ultra vires* agreement may be used as evidence, in the nature of an admission, of what is a reasonable rent, it cannot be allowed to govern or control the amount. It seems to us that it would be absurd to hold that the *ultra vires* lease is void and at the same time hold that it governs the rights of the parties with respect to the amount of rent to be recovered. A void instrument governs nothing. We think the correct rule is the one stated by Gray, J., in a recent case in the United States Supreme Court. He said that a contract made by a corporation which is unlawful and void, because beyond the scope of its corporate powers, does not by being carried into execution become lawful and valid; and that the proper remedy of the aggrieved party is to disaffirm the contract and sue to recover as on a *quantum meruit* the value of what the defendant has actually received the benefit of. *Pittsburg, etc., v. Keokuk, etc.*, 131 U. S. 371. We think this is the correct rule. 2 Beach on Corp., § 423, and cases there cited.

Exceptions sustained.

PETERS, Ch. J., EMERY, FOSTER, and HASKELL, JJ., concurred.

SECTION VI.—POWER TO PLEDGE OR MORTGAGE PROPERTY.

JACKSON, *ex dem.* THE PEOPLE v. BROWN.

IN THE SUPREME COURT OF JUDICATURE, OCTOBER TERM, 1830.

[Reported in 5 Wendell 590.]

THIS was an action of ejectment, tried at the Erie Circuit in April, 1830, before GARDNER, J.

The plaintiff claimed the premises in question under a mortgage from the Bank of Niagara to the people of the State, bearing date the 10th September, 1818, registered in the office of the Secretary of State the 25th September, 1819. The plaintiff produced an exemplification of a mortgage between "The President, Directors and Company of the Bank of Niagara, by John G. Camp,

¹ So much of the case as relates to this question should be considered in connection with the cases *infra*, pp. —ED.

their cashier, and lawful attorney, thereunto duly authorized, of the first part, and the people of the State of New York of the second part," signed John G. Camp, cashier. L. s. The defendant objected to the exemplification as evidence, insisting 1. That the Bank of Niagara had not the power to convey lands by mortgage to secure the payment of a debt. 2. That a mortgage to the people was not good unless authorized by statute. 3. That a corporation can convey lands only under its corporate seal; that no authority by seal was shown to have been conferred on Camp, and that the conveyance appeared to be under the individual seal of Camp, and not under the seal of the corporation. The judge reserved the questions, and permitted the evidence to be read to the jury. The plaintiff then proved a resolution of the Board of Directors of the Bank of Niagara of 21st of July, 1819, requesting the cashier of the corporation to execute a bond to the people of the State for the amount due them by the bank, and also to assign as collateral security, bonds, mortgages and other property given by individuals to the bank, to the amount of the debt due the State; and further, that the directors knew that the cashier executed the mortgage in question, and never disapproved of it. Whereupon the judge decided that the resolution conferred sufficient authority on the cashier to execute the mortgage; that it was not necessary that the power to Camp should be conferred under the corporate seal, nor that it should accompany the mortgage; that the resolution having been passed, and the act of the cashier not having been disapproved, the mortgage was binding upon the bank, and operative, although executed to the people of the State without any express statute. The plaintiff then proved a foreclosure of the mortgage and a conveyance to the people under a sale by advertisement. On the part of the defendant several judgments against the Bank of Niagara were shown, docketed 12th March, 1820, and executions and sales thereon, under which the defendant was in possession of the premises, and claimed to hold. The jury found for the plaintiff. The defendant, having excepted to the several decisions of the judge, now moved for a new trial.

I. S. Smith for the defendant.

Greene C. Bronson, Attorney-General, for the plaintiff.

SUTHERLAND, J. The Bank of Niagara is the common source of title, and if the mortgage to the State was duly executed, delivered and recorded the plaintiff must recover; the regularity of the foreclosure not being questioned.

The defendant, however, contends, 1. That the Bank of Niagara had no power to mortgage their real estate.¹ 2. That if they had the mortgage in this case was not well executed. 3d.

¹ Only so much of the opinion is given as relates to this question.—Ed.

That the comptroller had no authority to accept the mortgage on behalf of the State. We are of opinion that neither of these objections is well founded.

The act of incorporation, Laws of 1816, p. 184, declares that the bank shall be capable of purchasing, holding and conveying any estate, real or personal, for the use of the corporation, provided that such real estate be requisite for the convenient transaction of their business; or such as shall have been *bona fide* mortgaged to it by way of security or conveyed to it in satisfaction of debts previously contracted in the course of its business, or purchased at sales upon judgments which shall have been obtained for such debts. The case does not disclose the consideration given by the bank for this lot; but it is not for the defendant to deny that they properly acquired and had a right to hold it. They are expressly authorized to convey any estate, real or personal, in their possession, for the use of the corporation. If such power, however, had not been given in terms, it would have resulted, I apprehend, by necessary implication, from the power of taking by way of mortgage, or by absolute conveyance, in satisfaction of previous debts, or by purchase at sales upon judgments obtained by the bank. The authority to purchase real estate, when conferred on a moneyed corporation, if the purpose to which it is to be appropriated is not particularly specified, and all other dispositions of it prohibited, necessarily involves in it the power of subsequently selling and conveying it. It is not compatible with the purposes and interests of such institutions that their funds should be permanently vested in real estate. The general authority to sell and convey includes the authority to mortgage. A mortgage is but a conditional conveyance. It would be very extraordinary if this or any other corporation had not the power to appropriate its property to the payment or security of its honest debts.

There was no error in any of the decisions of the judge which have been excepted to, and the motion for a new trial is denied.

COMMONWEALTH *v.* JEROME V. C. SMITH AND OTHERS.

IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS, SEPTEMBER TERM, 1865.

[Reported in 10 Allen 448.]

BILL IN EQUITY seeking to impeach the validity of a mortgage, executed on the 30th of July, 1855, by the Troy & Greenfield Railroad Co. to the defendants as trustees, covering by its terms the franchise, railroad, and all other property of the corporation, then

owned or thereafter to be acquired, to secure bonds to the amount of \$900,000, to be issued to the contractor as part compensation for constructing the railroad, payable in thirty years from date. This mortgage recited the provisions of a contract for the construction of the railroad, dated December 30, 1854, to the effect that such bond should be given; and it was made subject to a prior mortgage to the commonwealth, to secure State bonds to the amount of \$2,000,000, which the commonwealth were to issue under the provisions of Stat. 1854, c. 226.

The following facts were agreed: Since the execution of the mortgage to the defendants, the commonwealth have received two other mortgages upon the railroad and franchise of the Troy & Greenfield Railroad Co., one of which was dated on the 6th of July, 1860, and the other on the 5th of March, 1862; and also a surrender from the corporation of all their property, subject to redemption under Stat. 1862, c. 156. On the 4th of September, 1862, the commonwealth took possession of the mortgaged premises in various towns, for breach of condition, in the manner shown by various certificates thereof, which are now immaterial. The commonwealth under their various mortgages have at various times, from October, 1858, to July, 1861, advanced to the Troy & Greenfield Railroad Co. large sums of money, amounting in all to several hundred thousand dollars. The corporation, under their mortgage to the defendants, have at various times, from August, 1855, to July, 1861, issued bonds to the amount in all of \$600,000, payable in thirty years from date. All of these bonds were issued in good faith, and are held by *bona fide* holders, and the corporation have issued no other bonds than the above. Before advancing any money to the corporation, the commonwealth had actual notice of the execution of the mortgage to the defendants, and of the fact that a number of bonds had been issued under the same. The amount of capital stock of the corporation which, in December, 1856, had been paid in was \$143,905.77.

Upon these facts, and others which are now immaterial, the case was reserved by the Chief Justice for the determination of the whole court.

D. Foster for the commonwealth.

S. Bartlett and *C. Allen* for the defendants.

HOAR, J. The question whether the mortgage made to the defendants by the Troy & Greenfield Railroad Co. is of any validity against the commonwealth requires the court to give a construction to the provisions of Stat. 1854, c. 286.¹ To ascertain what the legislature intended to authorize or prohibit by that statute, it

¹ So much of the opinion as relates to this statute has been omitted.
—ED.

will be expedient first to consider what were the powers of railroad companies in relation to the issue of bonds and the making of mortgages at common law, or before the statute was enacted.

There seems to be no reason why a railroad corporation should not be considered as having power to make a bond for any purpose for which it may lawfully contract a debt, without any special authority to that effect, unless restrained by some restriction, express or implied, in its charter, or in some other legislative act. A bond is merely an obligation under seal. A corporation having the capacity to sue and be sued, the right to make contracts, under which it may incur debts, and the right to make and use a common seal, a contract under seal is not only within the scope of its powers, but was originally the usual and peculiarly appropriate form of corporate agreement. The general power to dispose of and alienate its property is also incidental to every corporation not restricted in this respect by express legislation, or by "the purposes for which it is created, and the nature of the duties and liabilities imposed by its charter." *Treadwell v. Salisbury Manuf. Co.* 7 Gray, 404.

But in the case of a railroad company, created for the express and sole purpose of constructing, owning, and managing a railroad; authorized to take land for this public purpose under the right of eminent domain; whose powers are to be exercised by officers expressly designated by statute; having public duties, the discharge of which is the leading object of its creation; required to make returns to the legislature; there are certainly great, and, in our opinion, insuperable objections to the doctrine that its franchise can be alienated, and its powers and privileges conferred by its own act upon another person or body, without authority other than that derived from the fact of its own incorporation. The franchise to be a corporation clearly cannot be transferred by any corporate body of its own will. Such a franchise is not, in its own nature, transmissible. The power to mortgage can only be coextensive with the power to alienate absolutely, because every mortgage may become an absolute conveyance by foreclosure. And although the franchise to exist as a corporation is distinguishable from the franchises to be enjoyed and used by the corporation after its creation, yet the transfer of the latter differs essentially from the mere alienation of ordinary corporate property. The right of a railroad company to continue in being depends upon the performance of its public duties. Having once established its road, if that and its franchise of managing, using, and taking tolls or fares upon the same are alienated, its whole power to perform its most important functions is at an end.)

A manufacturing company may sell its mill, and buy another; but a railroad company cannot make a new railroad at its pleasure.

The whole reasoning of the court in the case of *Whittenton Mills v. Upton*, 10 Gray, 582, in which it was held that a manufacturing corporation has no power to make a contract of copartnership, applies with much greater force to the transfer of its franchise by a railroad company.

No case has been cited in which the exercise of such a power has ever been judicially sanctioned in this commonwealth, where there was not express legislative authority for it; and the cases in which the legislature has expressly conferred the power, or confirmed its exercise, furnish at once a strong implication that it would not otherwise exist, and afford a solution of the allusion to railroad mortgages which occur in the statutes.

We find no evidence that the commonwealth has ever known and sanctioned the irregular and illegal issue of the bonds in question, either directly or by implication. Nor do we think that they fall within the class of cases in which it has been held that a violation of corporate powers cannot be taken advantage of collaterally. The second mortgage to the commonwealth gives it a direct interest in the property, and, not being made expressly subject to any prior incumbrance, gives the right to maintain and prove that the supposed conveyance to the defendants was illegal and void.

The result to which the point decided leads is this: that, the defendants having no title which they can maintain against either of the mortgages to the commonwealth, the plaintiffs have a plain, complete and adequate remedy at law for any interference with the mortgaged property, and the bill must be dismissed.

CHARLES J. HENDEE AND ANOTHER v. JOHN M. PINKERTON.

IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS, JANUARY TERM, 1867.

[*Reported in 14 Allen 381.*]

BILL IN EQUITY brought by trustees under a mortgage issued by the Grand Junction Railroad & Depot Co., as security for certain bonds of said company, to compel the defendant specifically to perform his written agreement to accept and pay for certain land in East Boston, bid off by him at auction. The following facts were agreed.¹:

¹ Only a portion of the statement of facts is given.—Ed.

By the act incorporating the Grand Junction Railroad & Depot Co., and acts in addition thereto, prior to the adoption of the by-laws hereinafter referred to, that corporation was authorized to hold lands in East Boston for depots and storehouses, as well as for railroad purposes, and to allow any other railroad corporation to establish depots upon its premises, and to sell or lease the land necessary therefor; and at the date of the mortgage hereinafter referred to, the corporation owned large tracts of land in East Boston, upon which it was engaged in constructing wharves and warehouses for storage of merchandise, and the lands conveyed by said mortgage, and the subject of this suit, were purchased for the like use, and were not required for the railroad track of the corporation, or for other railroad purposes.

On the 1st of January, 1853, a mortgage was executed to the plaintiffs, as trustees, in the name of the corporation, of several parcels of land owned by the corporation, and about a mile of its railroad track, in East Boston, to secure bonds of that date to the amount of \$100,000, payable in five years. This mortgage was signed on the part of the corporation by its president, in pursuance of a vote of the directors authorizing him to do so, and to cause the seal of the company to be affixed thereto.

The equity of redemption of the corporation in the lands conveyed by the mortgage was sold on execution to one Welch, who conveyed the same to George W. Gordon; and by said sale and conveyance a good title to the equity of redemption was vested in Gordon, provided the mortgage was valid; and the corporation never redeemed the premises therefrom.

The plaintiffs, likewise, upon default of payment of the bonds, and after demand made upon the corporation for payment of one of them, and by the request of the holders of more than one-half in amount of the bonds, entered upon the premises, and, in pursuance of the terms of a power of sale contained in the mortgage, sold the parcel of land which is the subject of this suit by auction to the defendant, he being the highest bidder therefor; and a memorandum of the sale was accordingly signed by the defendant, in which he agreed to comply with the terms thereof, and he paid into the hands of the auctioneer \$100 to bind the bargain. The terms of sale provided that if any defect of title should appear, which could not be remedied by the sellers within thirty days, the sale should be void at the option of either party.

The plaintiffs, on the 20th of March, 1866, tendered to the defendant their own deed, a deed from Gordon, and a deed from the corporation, and the defendant refused to accept them.

Upon the foregoing facts the case was reserved by FOSTER, J., for the determination of the full court.

W. G. Russell for the plaintiffs.

No counsel appeared for the defendant.

FOSTER, J.¹ 1. We entertain no doubt that the Grand Junction Railroad & Depot Co. could lawfully sell and convey the lands embraced in this bill. They were not acquired to enable the corporation to carry on the business which it was chartered to do for the benefit of the public, nor needed or used for that purpose. Their alienation in nowise impaired or affected the usefulness of the company as a railroad, or its ability to exercise any of its corporate franchises. In the absence of any express or implied legislative prohibition, this corporation possessed all the ordinary rights of ownership over these lands, and could convey them away absolutely, or mortgage them to secure any valid indebtedness. The recent cases in which railroad mortgages have been adjudged invalid by this court do not countenance any doubt of the power of a railroad company to sell and convey whatever property it may hold, not acquired under the delegated right of eminent domain, or so connected with the franchise to operate and manage a railroad that the alienation would tend to disable the corporation from performing the public duties imposed upon it, in consideration of which its chartered privileges have been conferred.

The special provisions of the acts relative to this company contemplate the acquisition of lands for sale or lease to other railways, and the parcels included in the bill are agreed to have been purchased for such purposes, and not for the use of the corporation in its own railroad business.

2. It may be true that so much of the mortgage as embraced a portion of the railroad track and the franchise belonging thereto is inoperative and void. But the parcels of land conveyed are entirely separate and independent, not in any way connected with this piece of track. The ordinary rule must be applied to this conveyance, by which, if the part that is valid can be separated from that which is void, and carried into effect, it will be done. *Amesbury v. Bowditch Ins. Co.*, 6 Gray, 607.

Upon all the questions submitted to us no defect appears to exist in the title of the plaintiffs in equity, and they are entitled to a decree for specific performance by the defendant of his contract to purchase and pay for the lands described in the bill.

¹ Only so much of the opinion is given as relates to the power of the corporation to execute a mortgage.—Ed.

JONES v. GUARANTY AND INDEMNITY CO.

IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM,
1869.

[Reported in 101 United States Reports 622.]

Benjamin F. Tracy for the appellant.

George F. Comstock and William Allen Butler contra.

SWAYNE, J., after making the foregoing statement, delivered the opinion of the court.¹

The analysis of this case in the preceding statement divests it of all extraneous considerations, and presents it in the nakedness and simplicity of its material facts.

The central and controlling questions to be determined are :

Whether the Oil Co. had the power to give a mortgage for future advances;² and,

Whether the mortgage here in question is, in the view of a court of equity, for the debt of the Oil Co. or for the debt of Abraham M. Cozzens.

The oral arguments of the eminent counsel who appeared before us were addressed principally to these subjects. Numerous other points are made by the counsel for the appellant in his brief, and have been fully discussed in the printed arguments upon both sides. They are minor in their character, and we think involve no proposition that admits of doubt as to its proper solution. We are satisfied with the disposition made of them by the Circuit Court, and shall pass them by without further remark.

At the common law, every corporation had, as incident to its existence, the power to acquire, hold, and convey real estate, except so far as it was restrained by its charter or by act of Parliament. This comprehensive capacity included also personal effects of every kind.

The *jus disponendi* was without limit or qualification. It extended to mortgages given to secure the payment of debts. 1 Kyd, Corp. 69, 76, 78, 108; Angell & Ames, § 145; 2 Kent, Com. 282; Reynolds v. Commissioners of Stark County, 5 Ohio, 204; White Water Valley Canal Co. v. Vallette, 21 How. 414.

A mortgage for future advances was recognized as valid by the common law. Gardner v. Graham, 7 Vin. Abr. 22, pl. 3. See also Brinkerhoff v. Marvin, 5 Johns. (N. Y.) c. 320; Lawrence v. Tucker, 23 How. 14.

¹ The statement of facts has been omitted.—Ed.

² Only so much of the opinion is given as relates to this question.—Ed.

It is believed they are held valid throughout the United States, except where forbidden by the local law.

The statute under which the Oil Co. came into existence made it "capable in law of purchasing, holding, and conveying any real and personal estate, whenever necessary to enable" it to carry on its business; but it was forbidden to "mortgage the same, or give any lien thereon." This disability was removed by the latter act of 1864, which expressly conferred the power before withheld. This change was remedial, and the clause which gave it is, therefore, to be construed liberally with reference to the ends in view.

The learned counsel for the appellant insisted that a mortgage could be competently given by the Oil Co. only to secure a debt incurred in its business and already subsisting. This, we think, is too narrow a construction of the language of the law. A thing may be within a statute but not within its letter, or within the letter and yet not within the statute. The intent of the law-maker is the law. *The People v. Utica Insurance Co.*, 15 Johns. (N. Y.) 357; *United States v. Babbit*, 1 Black, 55.

The view of the court in *Thompson v. New York & Hudson River Railroad Co.*, 3 Sandf. (N. Y.) c. 625, was sounder and better law. There the charter authorized the corporation to build a bridge. It found one already built that answered every purpose, and bought it. The purchase was held to be *intra vires* and valid. Here the object of the authorization is to enable the company to procure the means to carry on its business. Why should it be required to go into debt, and then borrow, if it could, instead of borrowing in advance, and shaping its affairs accordingly? No sensible reason to the contrary can be given. If it may borrow and give a mortgage for a debt antecedently or contemporaneously created, why may it not thus provide for future advances as it may need them? This may be more economical and more beneficial than any other arrangement involving the security authorized to be given. In both these latter cases the ultimate result with respect to the security would be just the same as if the mortgage were given for a pre-existing debt in literal compliance with the statute. No one could be wronged or injured, while the corporation, whom it was the purpose of the law to aid, might be materially benefited. Is not such a departure within the meaning, if not the letter, of the statute? There would be no more danger of the abuse of the power conferred than if it were exercised in the manner insisted upon. The safeguard provided in the required assent of stockholders would apply with the same efficacy in all the cases. The object of the loan, the application of the money, and the restraints imposed by the charter in those particulars,

would be the same, whether the transaction took one form or the other. According to our construction, the company could give no mortgage but one growing out of their business, and intended to aid them in carrying it on. In legal effect the difference between the two constructions is one merely of mode and manner, and not of substance.

Such securities are not contrary to the law or public policy of the State. Many cases are found in her reported adjudications where both judgments and mortgages for future advances have been sustained.

Our view is not without support from the language of the statute, that "every mortgage so made shall be as valid to all intents and purposes as if executed by an individual owning such real estate." If this mortgage had been given by individuals, the question we are examining doubtless would not have been brought before us for consideration.

When a deed is fatally defective for the want of a sufficient consideration to support it, such a consideration subsequently arising may cure the defect and give the instrument validity. *Sumner v. Hicks*, 2 Black, 532. It is not necessary to go through the form of executing a second deed to take the place of the first one. This principle applies to the mortgage after all the advances had been made, conceding that it had before been invalid for the reason insisted upon.

The statute of 1864 neither expressly forbids nor declares void mortgages for future advances.

If the one here in question be *ultra vires*, no one can take advantage of the defect of power involved but the State. As to all other parties, it must be held valid, and may be enforced accordingly. *Silver Lake Bank v. North*, 4 Johns. (N. Y.) Ch. 370; *National Bank v. Matthews*, 98 U. S. 621. In the latter case this subject was fully examined.

A corporation can act only by its agents. If there were any such technical defect as is claimed touching the execution of this mortgage, it has been cured by acquiescence and ratification by the mortgagor.

No one else can raise the question. All other parties are concluded. *Gordon v. Preston*, 1 Watts (Pa.), 385.

Where money had been obtained by a corporation upon its securities which were irregular and *ultra vires*, but the money was applied for the benefit of the company, with the knowledge and acquiescence of the shareholders, the company and the shareholders were estopped from denying the liability of the company to repay it. And the same result follows where such securities are issued with the knowledge of the shareholders, so far as the

money thus raised is applied for the benefit of the company. *In re Cork & Youghal Railway Co.*, Law. Rep. 4 Ch. 748.

A court of equity abhors forfeitures, and will not lend its aid to enforce them. *Marshall v. Vicksburg*, 15 Wall. 146. Nor will it give its aid in the assertion of a mere legal right contrary to the clear equity and justice of the case. *Lewis v. Lyons*, 13 Ill. 117.

Decree affirmed.

In re PATENT FILE CO., *ex parte* BIRMINGHAM BANK-
ING CO.

IN THE COURT OF APPEAL IN CHANCERY, DECEMBER 13, 1870.

[*Reported in Law Reports, 6 Chancery Appeal Cases 83.*]

Hardy, Q. C., and *Locock Webb* for the appellant.

Dickinson, Q. C., and *Chitty*, *contra*, were not called upon.

JAMES, L. J. This case appears to me one of the simplest description.¹ The company is a body corporate, and by the law of England a body corporate can hold property and dispose of it as freely as an individual, unless it is specially prohibited from so doing. In the memorandum and articles of this company I can find nothing to prevent the company *qua* company from pledging part of its property for payment of a debt incurred in the course of its business. It is equally plain that, under these articles, the directors can do anything which the company could do, unless it is an act which they are specially prohibited from doing. I can find nothing to prevent the company *qua* company from directors from making the best terms they can with a creditor of the company by selling or pledging part of the property of the company. No doubt, a disposition of the property by the directors might be void in equity if it were contrary to the objects of the company; the directors would then be restrained from doing the act, as being an abuse of their fiduciary position. But in the present case there is nothing to prevent the company from making such an arrangement as with a creditor, nor is there anything to prevent the directors from doing so.

There is no pretense for saying that this is a case of fraudulent preference. The bank required security. The directors cannot be supposed to have had any particular affection for the bank, but they wanted accommodation from the bank, and so they gave the security required. They mortgaged property worth £35,000

¹ The statement of facts has been omitted.—Ed.

for £25,000, so it was not a security exhausting the property, and it was not tendered by the debtor, but asked for by the creditor.

MELLISH, L. J. I am of the same opinion. As to the question of fraudulent preference, the case is perfectly clear. The security was given in consequence of a demand by the creditor, and not only so, but there is nothing to show that a winding-up of the company was then contemplated. On the contrary, the directors intended to go on, and thought that by raising money they could retrieve the affairs of the company. It was next urged that this security was void, because it was a pledging the entire property of the company in such a way that, if done by an individual, it would have been an act of bankruptcy. The answer to this is twofold: First, that there is no provision in the Companies Act that every transaction which in the case of an individual would be an act of bankruptcy shall be void as against creditors; and the legislature appears designedly to have omitted any enactment of that kind. Secondly, this is not a mortgage of the whole property of the company, for the shares were not fully paid up.

The third objection is the only one that could raise any serious doubt, namely, whether a joint stock company of this kind can raise money or give security for a past debt by deposit of title deeds. It was urged that no company can mortgage unless expressly authorized to do so. Now, the company has property which it is authorized to deal with, and I should say that the true rule is just the contrary, namely, that the company can mortgage unless expressly prohibited from doing so. The 43d section of the act appears to recognize the creation of mortgages as an ordinary incident to a company.//The memorandum in the present case mentions as a purpose of the company the "disposing of" its landed property. The articles give to the directors the whole powers of the company, subject to the provisions of the articles and of the Companies Act, 1862, and I cannot find anything either in the act or the articles to prohibit their making a mortgage by deposit. It would, in my opinion, be most undesirable to lay down a rule that no joint stock company can raise money in this way. A mortgage by deposit is the kind of security most usually given by mercantile men to bankers, and such a rule would seriously cripple joint stock companies in their business transactions. There being nothing in the articles to prohibit the giving such a security, I am of opinion that the company can give it as well for a past debt as for a future one. In fact, the case is stronger in favor of a security for a past debt, as it would be absurd to say that a company has not power to pay past debts; and if so, why should it be debarred from giving security, which is one way of applying its property in payment of its debts?

SECTION VII.—POWER TO ENTER INTO A COPARTNERSHIP.

WHITTENTON MILLS *v.* GEO. B. UPTON AND OTHERS.

IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS, MARCH
TERM, 1858.

[*Reported in 10 Gray 582.*]

PETITION by a manufacturing corporation to set aside proceedings in insolvency, instituted against the corporation and William Mason, of Taunton, in the county of Bristol, as partners, upon Mason's petition; to restrain the assignees appointed under those proceedings from further interfering with their estate; and to compel the judge of insolvency to entertain a petition of the corporation for the benefit of the insolvent laws respecting insolvent corporations. The facts of the case, as appearing by the report of a special master in chancery, were as follows:

The Whittenton Mills were incorporated by St. 1836, c. 19, for the purpose of manufacturing cotton goods at Taunton; and, at the time of organizing under their charter, adopted by-laws, extracts from which are copied in the margin.

The Taunton Manufacturing Co., a corporation authorized by their charter (St. 1822, c. 44) to manufacture iron, copper, cotton and wool, failed in 1836, and their property was divided among their creditors. The Whittenton Mill, one of their establishments, was taken by certain persons who had been stockholders in the Taunton Manufacturing Co., and became stockholders in the Whittenton Mills corporation.

Leach & Keith and Crocker & Richmond, occupying a machine shop, foundry, tools and machinery which had previously belonged to the Taunton Manufacturing Co., furnished the greater part of the machinery required for the Whittenton Mill from 1836 until 1842, when they failed, and their foundry, machine shop, tools, machinery and stock passed into the hands of officers of the law for sale and distribution among their creditors, and the tools, machinery and stock were purchased and the foundry and machine shop hired by Mason.

On the 28th of May, 1842, the Whittenton Mills and Mason made an agreement in writing, that the corporation should advance to him the money necessary to pay for said tools, machinery and stock, and for the rent of the shop and foundry, and for the stock and labor which might be required in carrying them on, and be paid interest on the advances; and that, after paying a certain an-

nual salary to Mason, the profits on patents then held or afterward obtained by him, and all other profits derived from the manufacture of machinery or other work of the machine shop, should be equally divided between the parties for five years. On the 1st of June, 1845, the parties further agreed in writing that their joint business should be done and their joint property held in the name of William Mason & Co.; and the shops hired by them and their stock of tools and machinery being insufficient, that land should be purchased, buildings erected and machinery and tools purchased or constructed forthwith to supply the deficiency; that Mason, besides an annual salary, should receive a certain sum on each spindle made by the parties under his patents, or sold to others; that the firm and their successors should have the right to use, without charge, all inventions and improvements in machinery made by Mason during the continuance of the agreement; that interest should be allowed to each party on all sums furnished for the use of the partnership; that the accounts should be stated annually, and be at all times open to the examination of the parties; that the profits, after deducting the allowance to Mason, should be equally divided between him and the Whittenton Mills; and that the agreement should continue in force for seven years from its date, unless sooner cancelled by mutual consent. And it was afterward, by agreement in writing, extended for three years more.

It was a great convenience for the Whittenton Mills to have the control of a foundry and machine shop, situated, as this foundry and shop were, within two miles of their factory, and to have the right to use the patterns in the shop, and the patents of Mason. The officers of the corporation made these agreements with the sole object of realizing profits from the manufacture and sale of machinery, and at the time of executing the agreement of 1842 the Whittenton Mill was in full operation and was supplied with all the machinery required.

Under and in pursuance of these agreements, the firm of William Mason & Co., composed of Mason and the Whittenton Mills, carried on a very extensive business (averaging \$175,000 a year and amounting in one year to \$350,000), confined to the manufacturing of machinery for cotton mills till 1852, when they built one locomotive engine. From this time the manufacture of locomotive engines received an increasing share of their attention till their insolvency in 1857, when it constituted about one-half of their business.

During the period of the partnership, the greater part of the machinery required by the Whittenton Mills was manufactured and sold to them by William Mason & Co. In the purchase and

sale of this machinery the parties dealt with one another as strangers. Mason & Co. also made repairs upon the machinery of the Whittenton Mills to the amount of \$4000 during that time. And Mason & Co. manufactured and sold to other persons and corporations large quantities of tools and machinery, and stated and rendered to the Whittenton Mills, as partners, annual accounts of the copartnership business, which resulted every year until 1852 in large profits, half of which, according to the terms of said agreements, was paid over or credited annually to the Whittenton Mills, and was by that corporation distributed, with their other profits, among their stockholders. Since 1852 the firm have been doing a losing business.

The capital stock of the corporation was divided into two hundred shares, the par value of which was \$500. The nature of the business in which Mason & Co. were engaged, and the manner of conducting it, were throughout known to all the officers of the corporation; and to all the stockholders, except one, who was the owner of four shares from the time of the organization until 1854, when he transferred them to one of the other stockholders, and who never attended a meeting of the corporation, but was a relative of a majority of the officers and of the stockholders, and with two of them was in the habit of consulting on his business affairs, and greatly relied on their judgment.

At and for some time before the insolvency aforesaid, William Mason & Co. were employed in making machinery, which they had contracted to furnish to the Whittenton Mills, to the value of \$35,000. The materials had all been procured, and the work was about three-quarters done. It was generally known in the shop of Mason & Co., and in the town of Taunton, and to many of the persons who furnished the materials and performed the labor on this machinery, that it was building for the Whittenton Mills. And debts for such materials and labor, to the amount of \$4000, have been proved against the estate of Mason & Co.

Mason contributed to the copartnership nothing but his skill and patent rights. The Whittenton Mills contributed all the capital required, and advanced to Mason & Co. all the money to pay for machinery, stock and tools originally purchased; and afterward, from time to time, made further advances to pay the accruing rents, and for the stock and labor, as well for the land purchased, and the tools and machinery required in carrying on the copartnership business, and were credited with these sums, and with interest thereon, in the annual accounts stated and rendered by Mason & Co. The advances were made with the expectation that they would be reimbursed out of the profits. The lands were all conveyed to William Mason and his heirs, but were purchased for

copartnership purposes, and the purchase money was charged in the copartnership account.

The general agent of the corporation (who was also their treasurer for a portion of the time), and Mason, represented to third persons, with whom the partnership was dealing, that the corporation was a member of the partnership. Two of the directors testified that they had never heard a doubt suggested that this partnership was a valid one till said insolvency proceedings were commenced; and there was no evidence that its validity was ever questioned until that time, by any person. One person, acting under a power of attorney, executed by Mason, and by the Whittenton Mills, through their general agent, and with the knowledge of their clerk, on the 12th of January, 1857, purporting to authorize him to use their partnership name "in signing and making checks, and drafts, and receipts, and endorsing drafts, checks, bills receivable, and bills of exchange," represented to those with whom he was negotiating for money and supplies for the shop that the Whittenton Mills was a member of the partnership, and upon the faith of such representations obtained money and materials to a large amount.

The Boston Manufacturing Co., incorporated in 1813 (St. 1812, c. 92), "for the purpose of manufacturing cotton, woollen and linen goods," erected at Waltham the first power loom mill in this country; and have a machine shop, in which they made the machinery for their own mill and for the two cotton mills of the Merrimack Co., the first erected in Lowell; and have also made machinery in large quantities for cotton mills in Baltimore, Lowell and other places. The Elliot Manufacturing Co., incorporated in 1823 (St. 1823, c. 11), "for the purpose of manufacturing cotton goods," furnished from their shop the machinery for one of the mills in Nashua, N. H. Cotton manufacturing companies generally have connected with their mills machine shops, or "repair shops," as they are called; and it is customary for such companies, when they have a good mechanic, and the patterns for a valuable machine, to furnish such machines to other factories.

This case was argued before all the judges on the 16th of June.

S. Bartlett and *B. R. Curtis* for the petitioners.

E. R. Hoar and *H. Gray, Jr.*, for the assignees.

THOMAS, J. This is a petition to this court, sitting in equity, and as such having, by the St. of 1838, c. 163, the jurisdiction and the supervision of all proceedings in insolvency. The averments of the petition are admitted by the answers of the respondents. Nor is there a question upon the facts agreed that a copartnership was entered into by the Whittenton Mills and the said Mason, and for the purposes stated, if the corporation was capable in law of

entering into and forming such a partnership and for such ends.

But the petitioners say, first, that the Whittenton Mills could not enter into any legal partnership; secondly, that if it were so capable, it could not form a copartnership for the prosecution of a business foreign to the purpose for which alone it was created; thirdly, that if such legal partnership existed, the petitioners were not liable to be declared insolvent upon the petition of Mason and under the St. of 1838, c. 163, and the acts in addition thereto; such acts respecting only natural persons and making no provision for bodies corporate.

At the threshold of the cause and of its elaborate discussion is the question, Was this corporation capable of forming a partnership, of entering into the contract? This question presents itself in two forms. The more general one is: Has a corporation, as one of its usual inherent powers, the capacity to form a contract of copartnership? The narrower question, but for this case the practical and pertinent one, is: Can a manufacturing corporation in this commonwealth, incorporated since February, 1831, and subject to the provisions of the 38th and 44th chapters of the Revised Statutes, enter into a contract or society of copartnership?

This corporation was created in March, 1836, as a manufacturing corporation, for the purpose of manufacturing cotton goods in the town of Taunton, and for that purpose was invested with all the powers and privileges and made subject to all the duties, restrictions and liabilities set forth in the 38th and 44th chapters of the Revised Statutes, passed on the 4th of November preceding, but not to take effect till the 1st of May, 1836. St. 1836, c. 19. This charter, with the provisions of the chapters referred to and made part of it, is the origin and source of the powers and functions of the corporation. What powers are granted expressly, or by implication, because necessary or usual for the purposes which this charter was given to effect, the corporation has, and no more.

There is one obvious and important distinction between such a society as this charter creates and that of a partnership. An act of the corporation, done either by direct vote or by agents authorized for the purpose, is the manifestation of the collected will of the society. No member of the corporation, as such, can bind the society. In a partnership each member binds the society as a principal. If then this corporation may enter into partnership with an individual, there would be two principals, the legal person and the natural person, each having, within the scope of the society's business, full authority to manage its concerns, including even the disposition of its property.

The second section of c. 38 of the Rev. Sts. provides that the business of every such manufacturing corporation shall be man-

aged and conducted by the president and directors thereof and such other officers, agents and factors as the company shall think proper to authorize for that purpose. It is plain that the provisions of this section cannot be carried into effect where a partnership exists. The partner may manage and conduct the business of the corporation, and bind it by his acts. In so doing he does not act as an officer or agent of the corporation by authority received from it, but as a principal in a society in which all are equals, and each capable of binding the society by the act of its individual will.

Indeed, in examining this chapter, it will be found that there is scarcely a provision for the conduct of the business of a manufacturing corporation that is not inconsistent with the existence of a contract by which the power to manage the business of the company and to bind the corporation by its acts is vested in one not a member of the corporation, nor its officer or agent. Such are the third, fourth and fifth sections, providing how the president and directors, and other officers, agents and factors of the corporation shall be chosen. Such, too, is the sixth section, which authorizes every such company to make by-laws for its own regulation and government. Such are the several provisions authorizing the stockholders to fix the amount of the capital stock, to increase the same within the limit fixed by law or to reduce it. §§9, 11, 19. And such is the provision requiring the president and directors to give annual notice of the amount of the debts of the corporation; the means of stating which would not be in their power if another principal had the power of creating the debts. § 22. Of the same character is the 25th section, by which it is declared that the whole amount of the debts which the corporation shall at any time owe shall not exceed the amount of the capital stock actually paid in, and which renders the directors, under whose administration an excess shall occur, liable personally to the extent of such excess; a provision evidently based upon the ground that the exclusive power to contract debts is vested in such directors, and that they cannot be divested of it, and which is wholly inconsistent with the existence of a power in the corporation to enter into a contract of partnership, by which another principal would be created, having equal power to contract debts and to bind the partnership and the corporation *in solido*.

Indeed, the effect of all our statutes, the settled policy of our legislature, for the regulation of manufacturing corporations is that the corporation is to manage its affairs separately and exclusively; certain powers to be exercised by the stockholders, and others by officers who are the servants of the corporation and act in its name and behalf. And the formation of a contract, or the

entering into a relation, by which the corporation or the officers of its appointment should be divested of that power, or by which its franchises should be vested in a partner with equal power to direct and control its business, is entirely inconsistent with that policy.

The power to form a partnership is not only not among the powers granted expressly or by reasonable implication, but is wholly inconsistent with the scope and tenor of the powers expressly conferred and the duties expressly imposed, upon a manufacturing corporation under the legislation of the commonwealth.

The difficulties would be obviously greater in holding such a partnership to be valid, when formed and carried on for the prosecution of a business other than that, if not foreign from that, for which the corporation was created. It is difficult to see how the corporation should engage in such business, even when under its own control, still less to enter into copartnership with third persons for that purpose.

By the St. of 1852, c. 195, not adverted to in the argument, corporations created for the manufacture of woollen and cotton goods are authorized to carry on certain other manufactures, but this only when four-fifths of the stockholders shall, by a vote at a special meeting called for the purpose, consent to the same. This statute furnishes a pretty strong implication that the power to carry on a different business from that for which the corporation was chartered, did not exist before the statute was passed.

We are, therefore, all of opinion that in the formation of the alleged partnership the corporation exceeded the powers given by its charter expressly or by implication, and that the contract of copartnership was illegal and void.

It is said, however, that if this be so, such violation of the charter can only be alleged by the commonwealth upon proceedings for a forfeiture of the charter, and that the validity of the partnership cannot be called in question by the corporation or by its creditors or debtors.

As the basis of proceeding against the Whittenton Mills in insolvency upon the petition of Mason under the St. of 1838, c. 163, § 21, even supposing that the provisions of that statute are not limited to natural persons, it was necessary to show the existence of an actual copartnership between Mason and the corporation. It was not sufficient to show that they had so conducted as to be liable to third persons as partners; they must be partners *inter sese*. *Hanson v. Paige*, 3 Gray, 239. There must be a contract of copartnership between them. Into such a contract the petitioners were incapable of entering.

But the case rests upon broader grounds. The charter of the

corporation is part of the public law. Rev. Sts. c. 2, § 3. Those who deal with the corporation must take notice of the extent of its powers, and that the corporation is legally incapable of entering into the contract of partnership; that that contract was beyond the scope of its authority, and that this incapacity resulted from considerations not personal or peculiar to this corporation or its members, but from general grounds of public policy, which the corporation and those dealing with it cannot be permitted to contravene and defeat. That policy is to confine these corporations within the limits prescribed by law, to protect the stockholders from liabilities which the charter and laws do not create; and, while it imposes upon the stockholders of the corporation heavy responsibilities, to retain to them the legal control of its business and conduct of its affairs.

The precise point at issue before us is the validity of these proceedings in insolvency. That depends, as before remarked, upon the existence of the partnership between the Whittenton Mills and Mason. Upon that only could the petition of Mason be sustained.

It is not necessary for this purpose to decide how far these considerations will affect those claiming to be the creditors or debtors of the alleged partnership. It is in this point of view only, that the cases of *Chester Glass Co. v. Dewey*, 16 Mass. 94; *Quincy Canal v. Newcomb*, 7 Met. 276, and *White v. South Shore Railroad*, 6 Cush. 412, can be deemed material. They have the tendency to show the existence of a contract between the Whittenton Mills and Mason, which the former is estopped to question.

In the case of *Chester Glass Co. v. Dewey*, one ground of defence to the recovery for goods sold and delivered by the plaintiff corporation was that the corporation was prohibited from trading. The court held that the legislature did not intend to prohibit the supply of goods to those employed in the manufactory. That certainly was the end of the matter. The court, however, added that the defendant could not refuse payment on this ground, but that the legislature may enforce the prohibition by causing the charter to be revoked. This suggestion will be entitled to consideration if a question should arise as to the right of the alleged company to recover for goods sold, but it certainly is not conclusive upon the relation of the partners *inter sese*.

In *Quincy Canal v. Newcomb*, it was held that, where a canal was opened and toll claimed and the defendant used the canal, he was liable to the payment of such toll and could not avoid such payment by showing that the canal had not been made so deep as the statute required.

In *White v. South Shore Railroad*, it was held that the defendants were liable for damages in constructing their road through

and across a mill pond authorized by the general court to be raised in a navigable river, though in erecting the dam for raising the pond the condition of the act permitting it had not been complied with. The court said that the railroad company could not take the petitioners' pond from them because the dam was not constructed in compliance with the act; that whether it had been so constructed was a matter between the Government and the petitioner.

If the assent of all the stockholders were shown to the formation of the partnership—which is not the fact—it could not enlarge the powers of the corporation, or make that legal which was inconsistent with the law limiting their powers and prescribing their duties. Whether, if such assent were available, it could be manifested in any other mode but a vote of the stockholders, it is not necessary to inquire.

The decision of the question as to the existence of the partnership between the Whittenton Mills and William Mason in the negative renders unnecessary the inquiry whether, if a partnership had existed, the petitioners could be subjected to the provision of the insolvent law of 1838, c. 163, and the acts in addition thereto.

The proceedings in insolvency founded upon the petition of Mason as the partner of said Whittenton Mills under the firm of William Mason & Co. were illegal and must be vacated and set aside, so far as they effect the estate of the Whittenton Mills. A mandamus must issued to the judge in insolvency for the county of Bristol to proceed upon the petition of the Whittenton Mills, to hear the parties, and, good cause being shown, to issue his warrant thereon.

Decree accordingly.

PHILIP ALLEN & SONS v. WOONSOCKET COMPANY.

IN THE SUPREME COURT OF RHODE ISLAND, FEBRUARY 3, 1876.

[Reported in 11 Rhode Island Reports 288.]

BILL IN EQUITY brought by the surviving copartners of the firm of Philip Allen & Sons against the respondent corporation, charging that there had existed between the respondent and the complainants a copartnership to carry on the business of calico printing. The prayer of the bill was for an account and settlement. The facts as found by the court are sufficiently stated in its opinions.

POTTER, J. The old firm of P. Allen & Sons having failed, and all the parties having made assignments in 1857, a new firm, under the same name, was formed by the same parties, by an agreement in writing, November 26, 1858.

In June, 1858, the print works formerly owned by P. Allen & Sons were sold by their assignees, and purchased by the Woonsocket Company (a corporation chartered by the legislature in 1832), who had occupied them on lease from the assignees of P. Allen & Sons after their failure.

The bill alleges that said defendant corporation, by Crawford Allen, its agent, on November 26, 1858, formed a partnership with P. Allen & Sons, to carry on said printing business; the corporation to furnish the works and capital, the said P. Allen & Sons to manage the business and devote their skill, attention, and influence to it, and to receive for such services a salary of \$200 per month, and twenty per cent. of the profits of the business, and that said business was so carried on until Philip Allen's death, on December 16, 1865, when the agent notified said P. Allen & Sons that their interest in the business ceased; that large profits were made; and that complainants received the salary, and a portion but not all of the share of profits they were entitled to, and praying for an account and payment of the balance that may be found due.

The answer denies the partnership, contends that such a partnership could not legally exist, as being *ultra vires* on the part of said Woonsocket Company; that if it existed, it was terminated when the mill stopped in December, 1864, or when the accounts were closed and a new arrangement begun in May, 1865, instead of December 16, 1865, the date of Philip Allen's death; and that therefore the suit is barred by the statute of limitations, the bill not being filed until December 15, 1871; denies that any moneys were paid to P. Allen & Sons as a part of profits, but that what was paid over and above the salary was a gratuity, and for the use of a trade-mark, and not of right under contract; that stated and true accounts were rendered and allowed and settled by the parties, the last in December, 1870. The respondent claims the benefit of these allegations as if pleaded.

The answer also sets out other matters which, though bearing on these questions by way of inference and evidence, need not be noticed now.

The answer further alleges that on December 12, 1871, P. Allen, Jr., one of the complainants, released all claims against the respondent for services as partner or individually.

The first point of defence is that the respondent, being a cor-

poration chartered by the Legislature of Rhode Island, had no power to enter into a partnership; that the whole proceeding would be *ultra vires*.

The grounds on which the proceedings of corporations have been held to be void, as being beyond the powers given them by their charter, have been chiefly these:—

First. Because public policy requires that corporations should be confined to the business, and to the mode of managing that business prescribed by the charter, which is their law, and which they are bound to obey.

*Power not
assigned*

The act incorporating this company was passed at the January session A. D. 1832. It incorporates the Woonsocket Company. It seems strange, but is true, that no portion of the act specifies what business is to be done by the company, nor can its business be inferred from anything in its name.

Second. Because the individual stockholders of the company have a right to require that the corporation shall be confined to its legitimate business. They have invested their money on the faith that it will be so confined. A majority have no power to change it. The stockholders have invested their money also on the faith that its business will be managed by the officers provided for in the charter, and in whose election they have a voice; and while a majority, through their officers and agents, may make many binding contracts, they cannot transfer the whole control of their affairs to a body foreign to themselves.

Now, in this case, the charter does not specify by what officers the business of the corporation shall be managed; and during the whole period involved in this suit the Woonsocket Company had but one single stockholder. Crawford Allen owned the whole stock. There was no other stockholder with any right to complain that the business had been changed, or that the corporation had put the management of any portion of its business beyond its own control. And this, we think, makes a material difference between the present case and the cases to which we have been referred on the part of the respondent. The reason of the rule ceasing, the rule does not apply.

*Does not
specify who
shall
manage it
business.*

And besides, the partnership here set out was merely a partnership at will; and the corporation could terminate it and resume the full control of their business at pleasure.

*How does
this
matter.*

And if the agreement was merely an agreement to pay a part of profits for services without giving the complainants the control as partners, then it would not on any principle be *ultra vires*.

yes

In this case this point is raised in the answer, and the respondent claims the benefit of it as if he had demurred or pleaded.

As presented in the answer, it does not seem to be the proper subject of a plea.¹

All we mean to say is that questions of law should be raised by demurrer, where it can be done; and if not by demurrer, then as soon as possible *in limine*.

The bill alleges a partnership. The respondent was to furnish the works and capital, the complainants to have the charge and management, and devote their skill, attention, and influence to it, and for their services were to receive a salary and a certain portion of the profits.

Now, an agreement where one person puts in nothing but his skill may constitute a partnership, and subject the parties to all the liabilities of partners; and a person who puts in nothing but his skill may have the control of a partner. There is evidence that Philip Allen did have the entire control at the works; and there may be cases where partners by agreement may, as regards each other, divide the control of their business among themselves, each taking his part. But there is no need of going into the evidence upon this point of the degree of control exercised by the complainants, as there is here no question of any account of, or liability for, losses; it is practically the same as if it was a mere agreement to pay a part of profits for services without more. In either case, if proved, the right to an account would follow.²

We are therefore of opinion that the complainant is entitled to relief.

After the foregoing opinion had been given the case was reargued at the request of the respondent.

POTTER, J. The brief of the respondent, on the reargument of this case, complains of several misconceptions of fact and misstatements of law in the former opinion of the court.

Our attention has again been called to the doctrine of "Ultra Vires," and it has been strenuously contended that the Woonsocket Company had no power to purchase and operate print works or to enter into a partnership.³

The grounds, as before stated by us, on which proceedings of corporations have been held void as being beyond their charter powers, have been (see *Kindersley, V. C.*, in *Shrewsbury v. N. Staffordshire R. R. Co.* 35 L. J. Ch. 156, 172; quoted in *Brice on Ultra Vires*, by Green, p. 35; see also *Selden, J.*, in *Bissell v. Mich. South. & North. Ind. R. R. Cos.* 22 N. Y. 281),—

¹ So much of the opinion as relates to this question has been omitted.—Ed.

² The remainder of the opinion has been omitted.—Ed.

³ Only so much of the opinion is given as relates to this question.—Ed.

First. Because the charter, when accepted, constitutes a contract between the stockholders that the corporation shall be confined to its proper business, and that a majority cannot change it. A minority have been held bound in some cases by the fact of the acquiescence in or ratification of the acts of the majority.

In the present case there was no one who had a right to complain on this ground, Crawford Allen being sole stockholder.

Second. Because public policy requires that they should be confined to the business and the mode of managing business prescribed by the charter, which is their law.

In the present case the charter was passed in 1832. No portion of the act specifies even by implication the business to be done, and nothing can be implied even from its name. }}}}

Where a corporation is created for special purposes, there is no doubt that it must be confined in its operations to those purposes, and it can only exercise the powers expressly granted or impliedly necessary to carry out these purposes. But in the construction of its powers it may be sometimes very important to consider whether the corporation is bound to show that the act done is within its granted powers, or whether the contestant is bound to show that it is beyond them.

In the present case the question is very important. The powers to buy and sell land, &c., &c., are merely the powers usually granted to all corporations for whatever purpose incorporated. But the purpose or object is nowhere declared.

And the general rule may be stated to be that it lies on those who impeach the contract to show that it is avoided. Brice, *Ultra Vires*, by Green, cap. 1, § 3, and cases cited.) *see*

The contrary rule, which is contended for so earnestly by the counsel for the respondent, would probably produce a great deal of litigation in this state. It is believed there are many charters of corporations doing a very large business where in the charter itself no purpose whatever is specified (although in one, the *Lonsdale*, it is described in the title of the act, and there only as a manufacturing corporation), and a still greater number where the intended business can only be inferred from the name. In such cases the fact that the persons incorporated were doing a particular sort of business when incorporated, and the fact that the legislature and the incorporators have acquiesced in the doing of a particular business, or in a continued course of dealing, might be entitled to weight.

In this case the contention is that the respondent had no right to form a partnership, that a corporation must transact its business through its proper officers, and cannot delegate its powers in such a manner as to put its business beyond its control.

If the partnership had been for a definite period, it might well be argued that the respondent had no right to make such a contract. But it was a mere partnership at will, terminable at any moment by either party. The respondent, therefore, did no more part with the control of the business than if it had employed Philip Allen & Sons simply as agents, and its right to do that cannot very well be denied.

We have examined carefully the authorities to which we have been referred. Brice, *Ultra Vires*, part 3, cap. 2, iv., does indeed say that "agreements between companies which create a partnership between the parties thereto are void." The leading case he refers to is *Charlton v. Newcastle & Carlisle R. R. Co.* reported in *Weekly Reporter*, vol. 7, but more fully in 5 *Jurist N. S.* 1097, before Page-Wood, V. C., where two corporations contracted for a permanent amalgamation. This would have been equivalent to the creation of a new corporation without the consent of parliament.

And it is recognized by this author that certain arrangements may be made for division of profits or as to traffic, where there is no transfer of the powers of the corporation or merger of either separate corporation in a constituted whole.

The counsel have referred us to four American cases.

To the argument that the fact that there was only one stockholder cannot enlarge the powers of the corporation, we can only say that no such inference can properly be drawn from the language of the former opinion. That fact is only of importance upon the point that there were no stockholders with any right to complain of the acts of the corporation.

We intended to decide, and do decide, that we consider a contract of partnership, not of hire, proved.

We have considered all the points made on the reargument. We have noticed some of them in this opinion. We cannot see any reason for changing our former decision.

Former decision affirmed.

WILLIAM H. SWIFT *et al.*, RESPONDENTS, *v.* THE PACIFIC MAIL STEAMSHIP COMPANY *et al.*, APPELLANTS.

IN THE COURT OF APPEALS OF NEW YORK, JUNE 7, 1887.

[*Reported in 106 New York Reports 206.*]

APPEAL from judgment of the General Term of the Supreme Court in the first judicial department, entered upon an order made May 8, 1885, which affirmed a judgment in favor

of plaintiffs entered upon a verdict and affirmed an order denying a motion for a new trial.

This action was brought by the plaintiffs, as shippers, against the defendants, as common carriers, to recover damages for breach of a joint contract for the carriage of whale oil from Panama to New York.

The complaint alleged that the plaintiffs were copartners and that the defendants were corporations organized under the laws of this State; that the business of the Panama Railroad Company, among other things, was the transportation of freight from Panama by rail to Aspinwall, and there to deliver the same to the Pacific Mail Steamship Company, whose business it was, among other things, to transport the freight so received by vessel to New York; that the defendants, for a single price named, entered into a joint contract to carry the oil from Panama to New York; that they entered upon the performance of their contract in the months of January and February, 1873, and delivered a portion of the oil received by them from the plaintiffs, in the city of New York, about the 23d of April, 1873; that, owing to the negligence, delay and improper handling of the oil, and the casks containing the same, by the defendants, the oil was greatly damaged and injured, and a large part of it was lost by leakage while at Panama, on its way across the Isthmus, at Aspinwall, and also on the passage from Aspinwall to New York, and that by reason of negligence, improper conduct and mismanagement of the defendants, the plaintiffs suffered damages in the sum of \$20,000, besides interest. Each of the defendants, by a separate answer, among other things, denied the joint contract and the joint liability alleged in the complaint; alleged that the oil was delivered and carried under a special contract, printed and in writing, copies of which were delivered to plaintiffs, wherein the several rights and liabilities of plaintiffs and defendants, and each of them, with respect to plaintiffs and to each other, relative to the subject-matter of the complaint, were limited, defined and determined, and that its undertaking in regard to the oil was only under such contract, which it had fully performed; that it was not liable for losses accruing upon the route of the other defendant; and each defendant also alleged, as a separate defense, that there was a defect of parties plaintiff, and that several other persons named were then, and also at the time of the making of the contract and the transportation of the oil, jointly interested with the plaintiffs in the oil.

The further material facts are stated in the opinion.

George Hoadley for appellant.

William G. Choate for Panama Railroad Company, appellant.

Austen G. Fox for respondents.

EARL, J.¹ The Panama Railroad Company was organized to construct, maintain and operate a railroad across the Isthmus, from Panama to Aspinwall; and the Pacific Mail Steamship Company was organized to navigate steamships on the Pacific and Atlantic Oceans. Laws of 1848, c. 266, and Laws of 1850, c. 207. It is not disputed that the Panama Railroad Company could receive freight at Panama and contract to carry it beyond its terminus through to the city of New York, and that the Pacific Mail Steamship Company could receive freight at the city of New York, and contract to carry it to Aspinwall and thence by the railroad to Panama.

It is the well settled law in this State that a carrying corporation over a portion of a continuous line of transportation may contract to carry beyond the terminus of its route, and that such a contract is not *ultra vires*. *Weed v. Saratoga & Schenectady R. R. Co.*, 19 Wend. 534; *Wylde v. Northern R. R. Co.*, 53 N. Y. 156; *Root v. Great Western R. R. Co.*, 45 id. 524; *Condict v. Grand Trunk R. R. Co.*, 54 id. 500. Such contracts have been upheld sometimes upon the ground of estoppel, and sometimes upon the ground that they were incident to the business for which the contracting corporation was organized. While the defendants admit that such contracts could be made, they contend that the Pacific Mail Steamship Company could not contract to receive goods away from its terminus and to transport them to such terminus over the route of another carrier, and thence transport them over its own route to their destination. That is, while they admit that the steamship company could receive goods at the city of New York and contract to carry them to Panama on the Pacific coast, they deny that it could receive goods at Panama and agree to transport them to the city of New York. We see no reason for distinguishing between the two kinds of contracts, and for holding that the company could make the one kind and not the other. If when it receives goods at New York for transportation to Panama it is engaged in business authorized by its charter, or incident to such business, then when it procures freight at Panama for transportation to Aspinwall, and thence to New York, it is also engaged in promoting the legitimate business for which it was organized. It thus procures freight for transportation upon its steamships, and the business it thus does at Panama and across the Isthmus is just as legitimate as it would be to establish agencies on the Pacific coast to solicit freight for transportation from Aspinwall to New York, or to contract with newspapers there to advertise the carrying of such freight. Can-

¹ Only a portion of the opinion is given.—ED.

not a railroad company take freight for transportation at a point a few rods from its depot? And if it may a few rods, why not a few miles? If it may have a depot for the receipt of freight one mile from its terminus, why may it not have a depot fifteen or twenty miles therefrom, and transport the freight thence to its road by any means that it chooses to adopt? The Panama Railroad Company terminated on the Pacific coast at Panama, and there it owned lighters to go out into the ocean to take freight from vessels. If it could send its lighters out one mile, why could it not send them out several miles for the same purpose to some convenient port or roadstead? The main business of the steamship company between Aspinwall and New York was to transport passengers and freight which came from the Pacific coast, and instead of taking the passengers and freight at Aspinwall, why could it not take them at Panama? We see no reason for holding that it might not do so in the prosecution of its corporate business, and as incident thereto. Then again, if when the steamship company receives goods at New York under contract to carry them to Panama it is estopped from denying its authority and power to make the contract, why when it receives goods at Panama under contract to be carried to New York should it not be equally bound by estoppel?

We think, therefore, that it is clear upon principle and authority that both defendants were competent to enter into contract to carry this oil from Panama to New York. And as each was competent to contract alone, it cannot be doubted that they were competent to make a joint contract to do it. They could even become partners in the transportation business between Panama and New York, and so far as we have discovered, the power of corporations thus to become joint carriers has never been denied, but has frequently been recognized. *Aigen v. Boston & Maine R. R. Co.*, 132 Mass. 423; *Block v. Fitchburg R. R. Co.*, 139 id. 308; *Gass v. N. Y., Providence & Boston R. R. Co.*, 99 N. Y. 220; *Hot Springs R. R. Co. v. Trippe*, 42 Ark. 465; *Ins. Co. v. R. R. Co.*, 104 U. S. 146; *Barter v. Wheeler*, 49 N. H. 9; *Wylde v. Northern R. R. Co.*, *supra*; *Hutchinson on Carriers*, § 160. The right of a corporate carrier to go beyond its terminus to procure freight and passengers, and to transport them to its terminus for carriage over its route, is not absolute and unqualified, but has some limitations. What those limitations are it is not possible, in a general way, to define. The New York Central and Hudson River Railroad Company could not establish a line of steamers between Liverpool and New York to carry passengers and freight from Liverpool to New York, in order that it might secure the business of transporting such passengers and freight over its route

to Buffalo; but it might run ferry boats from Staten Island, or from the New Jersey shore, for the purpose of securing passengers and freight for transportation over its route. The right to go beyond its terminus to procure passengers and freight for transportation over its route, by a corporate carrier, must be exercised within reasonable limits, and under such circumstances that it may fairly be said to be incident to its legitimate corporate business; and our holding is that the Pacific Mail Steamship Company, engaged in transportation upon both the Pacific and Atlantic Oceans, did not go beyond reasonable limits in contracting to take freight at Panama and transport it over the Panama Railroad for delivery to its steamships at Aspinwall, its main business being to take freight coming to it over that railroad.

A careful consideration of the whole case has, therefore, led us to the conclusion that the judgment should be affirmed, with costs.

All concur.

Judgment affirmed.

MALLORY v. HANAUR OIL WORKS.

IN THE SUPREME COURT OF TENNESSEE, MAY 8, 1888.

[Reported in 86 Tennessee Reports, 598.]

APPEAL in error from Circuit Court of Shelby County. L. H. ESTES, J.

Metcalf & Walker for Mallory.

L. E. Wright and *L. & E. Lehman* for Hanaur Oil Works.

LURTON, J.¹ This is an action of unlawful detainer, brought by the Hanaur Oil Works, a corporation created under the General Incorporation Act of 1875, and engaged in the manufacture of cotton seed oil at Memphis, Tenn.

The facts which raise the question to be determined are these: In July, 1884, a contract was entered into by and between four corporations engaged in manufacturing cotton seed oil at Memphis for the formation of what is designated in the agreement as a "combination syndicate" and "partnership." The contracting mills agreed to select a committee, composed of representatives from each corporation, and to turn over to this committee the properties and machinery of each mill, to be managed and operated by this committee, through officers, agents, and employes selected by them, for the common benefit, the profits and losses

¹ A portion of the opinion has been omitted.—Ed.

of such operations to be shared in proportions agreed upon. This arrangement was to last one year, but with consent of all, might be renewed for two additional years, and, as appears, was at end of first year renewed for two other years, terminating August 1st, 1887.

The facts clearly establish that the possession of the several mills was turned over to this executive committee, and they were operated by these managers thenceforward under the name of the "Independent Cotton Seed Association." There was a provision in the contract by which other mills were to be admitted by consent, and a fifth corporation was in fact subsequently admitted. The Hanaur Oil Works was one of these contracting corporations, the contract being authorized by both share-holders and directors. In July, 1886, the business of the second year having been about concluded, the board of directors of the Hanaur Oil Works passed a resolution declaring this contract void, as being an agreement *ultra vires*, and their president was instructed to take possession of their mill.

It is, however argued by the learned counsel for appellants that if it be a partnership, that it does not therefore follow that it is *ultra vires*; that such a contract, not being prohibited by law or the charter of the defendant in error, or against public policy, is not void even if in excess of power expressly conferred; that the business proposed by the contract, being within the purposes of the charter, is therefore within the implied powers of the corporation, and not *ultra vires*. In other words, "that the question is not whether the corporation had, by virtue of the act of incorporation, authority to make the contract, but whether they are by those statutes *forbidden* to do it." In this doctrine we do not concur. There is, however, respectable authority for the position. A corporation, being an artificial creation, is the very thing it is made by the statute which brings it into being, and nothing more. The extent of its powers are those enumerated in its charter, or implied by fair and natural construction of powers expressly conferred.

The charter is the measure of its powers, and the enumeration thereof implies the exclusion of all others. We are not to look to the charter to see whether the thing done be prohibited, but whether there is authority to do it. These principles we understand to have the support of the great weight of authority in this country, and to have the sanction of the Supreme Court of the United States. *Thomas v. Railroad Company*, 101 U. S., 71.

This view of the law has been the one entertained by this Court, and clearly and distinctly enforced in an opinion by the present Chief Justice in the case of *Elevator Company v. Memphis &*

Charleston Railroad Company, 1 Pick., 703. The power to enter into a partnership is not expressly or impliedly conferred by our Act of 1875, under which the Hanaur Oil Works is incorporated. Neither is such authority within the implied powers of corporations. A partnership and a corporation are incongruous. Such a contract is wholly inconsistent with the scope and tenor of the powers expressly conferred and the duties expressly enjoined upon a corporation, whether it be a strictly business and private corporation or one owing duties to the public, such as a common carrier. In a partnership each member binds the firm when acting within the scope of the business. A corporation must act through its directors or authorized agents, and no individual member can, as such member, bind the corporation.

Now, if a corporation be a member of a partnership, it may be bound by any other member of the association, and in so doing he would act not as an officer or agent of the corporation, and by virtue of authority received from it, but as a principal in an association in which all are equal, and each capable of binding the society by his acts. The whole policy of the law creating and regulating corporations, looks to the exclusive management of the affairs of each corporation by the officers provided for or authorized by its charter. This management must be separate and exclusive, and any arrangement by which the control of the affairs of the corporation should be taken from its stockholders and the authorized officers and agents of the corporation would be hostile to the policy of our general incorporation acts. The decided weight of authority is that a corporation has not the power to enter a partnership, either with other corporations or with individuals. Says Mr. Morawetz: "It seems clear that corporations are not impliedly authorized to enter into partnership with other corporations or individuals. The existence of a partnership not only would interfere with the management of the corporation by its regularly appointed officers, but would impair the authority of the share-holders themselves, and involve the company in new responsibilities through agents over whom it had no control." 1 Morawetz on Corporations, sec. 421; Whittenton Mills v. Upton, 10 Gray, 582 (S. C., 71 Am. Dec., 681); Angel & Ames on Corporations, sec. 272

It is unnecessary to consider this contract as constituting a mere traffic arrangement; for the conclusion already announced that it was an effort to form a partnership, determines that in its scope and effect it sought to accomplish much more than would be understood by the phrase "traffic arrangement."

The next assignment is that this contract, if *ultra vires* at all, was so only as the the power of the officers, and not

as to the power of the corporation; that the thing to be done, being within the purposes and scope of the franchises of the corporation, and the contract being ratified by the shareholders, became valid and binding. There may be acts *ultra vires* as to the officers, and yet not so as to shareholders. But the contract here entered into we have already held to be beyond the power of the corporation, and such an act cannot be made valid by the assent of every stockholder.

It is next argued that if the contract be *ultra vires*, that it is an executed contract, and that the courts will not in such case interfere.¹ This contract had yet a little over one year to run. The possession of the Hanaur mills had been obtained under it, and was withheld under a claim of right by reason of the supposed validity of the partnership.

As to the unexpired time, during which the defendants in error might be deprived of the use of their property, and subjected to the hazards of another year's operations, it was not an executed contract. The possession obtained under this contract was illegal, and it was the duty of the officers of the Hanaur company to renounce the arrangement and recover possession. There are cases where an invalid contract, being fully executed, the courts will not entertain a suit to recover money or property transferred under such agreement; or, if they do interfere, will do so only upon equitable terms. But the defense here made would result, if successful, in enforcing the performance of the unexecuted part of a void contract. It is not a case of contract fully executed. The part remaining to be executed is a material part, and is beyond the power of defendant in error to make or sanction. Having entered into it, it was its duty to rescind or abandon it. In a case where a lease had been made by a railway company for a term of twenty years of its road and franchises, and which, after a lapse of five years, it rescinded, and was thereupon sued for damages under a clause in the lease which authorized rescission, and provided for compensation for unexpired term, the Supreme Court of the United States said: "It is not a case of a contract fully executed. The very nature of the suit is to recover damages for non-performance. As to this, it is not an executed contract; not only so, but it is a contract forbidden by public policy, and beyond the power of defendant to make. Having entered into the agreement, it was the duty of the company to rescind or abandon it at the earliest moment. This duty was independent of the clause which gave them the right to do it. Though they delayed its performance several years, it was nevertheless a right-

¹ So much of the opinion as relates to this question should be considered in connection with the cases *infra*, pp. —ED.

ful act when done. Can this performance of a legal duty, a duty both to stockholders and to the public, give to plaintiffs a right of action? Can they found such a right on an agreement void for want of corporate authority and forbidden by the policy of the law? To hold that they can is, in our opinion, to hold that any act performed in executing a void contract makes all its parts valid, and that the more that is done under a contract forbidden by law, the stronger is the claim to its enforcement by the courts." *Thomas v. Railroad Company*, 101 U. S., 86.

That the defendant in error has submitted to a void contract, by which it has been deprived of the use of its property for two years, furnishes no sound reason why it shall submit for three years. To hold that it did would be to apply the doctrine of part performance in a way to perfect and legalize illegal contracts which were partly performed.

We have not deemed it necessary to consider the question of the legality of such a combination of corporations as one tending to create a monopoly, for the ground upon which we place the case needs no additional prop. The question of the validity of such an arrangement is a very grave one, but need not now be considered.

The suggestion that if this contract was void, yet nevertheless it operated to convert the managers of the combination into tenants from year to year, and that such tenancy could only be terminated at end of a year and upon six months' notice, is not tenable. The relation of landlord and tenant never existed under the contract, if it be considered as valid, and could not spring from its illegality. The Hanaur mill company had a right to repudiate the arrangement at any time, and it was the duty of plaintiffs in error to have at once surrendered possession. The service of a writ in a suit of unlawful detainer was the only notice they could legally demand. When the action of unlawful detainer will lie under our statutes, no other notice than the suing out of a writ is necessary. Code (M. & V.), sec. 4082.

The result is, that we hold that there was no error in the charge of the Circuit Judge, or his refusal to charge, and the judgment must be affirmed, with costs.

Associate Justice Folkes, having been of counsel, did not sit in this case.

FRANK E. BATES, RESPONDENT, v. CORONADO BEACH
COMPANY, APPELLANT.

IN THE SUPREME COURT OF CALIFORNIA, SEPTEMBER 23, 1895.

[Reported in 109 California Reports 160.]

APPEAL from a judgment of the Superior Court of San Diego County and from an order refusing a new trial. GEORGE PUTERBAUGH, Judge.

The facts are stated in the opinion of the Court, and in the opinion reported in *Bates v. Babcock*, 95 Cal. 479.

Gibson & Titus for appellant.

Clarence L. Barber and J. W. Hughes for respondent.

HARRISON, J. The facts upon which the plaintiff seeks to recover are stated in the opinion upon the former appeal herein. (*Bates v. Babcock*, 95 Cal. 479.) Upon a retrial of the cause after it had been remanded, a nonsuit was granted as to the defendant Babcock, and judgment was rendered in favor of the plaintiff and against the appellant.

The Court found that the plaintiff and the appellant entered into a contract February 23, 1888, by which it was agreed that they should purchase certain lands and other property from the Millers, sell the same, pay certain debts and encumbrances thereon, and divide the profits and losses arising therefrom equally between them. This was the main issue upon the trial in the Superior Court; and, as the evidence on behalf of the plaintiff was ample to sustain the finding, the conclusion of the Court must be accepted as determinative of the issue.¹

The Court was justified in finding that Babcock was authorized to make the contract on behalf of the appellant. It was alleged in the complaint, and not denied, that Babcock was the president and general manager of the appellant corporation, and it fully appeared from the evidence that he had assumed the management and control of the general business of the appellant with full knowledge and acquiescence of its officers, and that at a meeting of its stockholders, held subsequent to the making of this contract, all of his acts were ratified and confirmed by them. Irrespective of the estoppel upon the appellant arising from the advantage derived by it from the full performance of the contract on the part of the plaintiff, these facts make the acts of Babcock in entering into the contract binding upon the appellant. Crow-

¹ A portion of the opinion relating to this question has been omitted.—Ed.

ley v. Genesee Min. Co., 55 Cal. 273; McKiernan v. Lenzen, 56 Cal. 61; Seeley v. San Jose, etc., Co., 59 Cal. 22.

It was not *ultra vires* for the appellant to enter into the agreement with the plaintiff. The power of a corporation to enter into a general partnership with an individual, or with another corporation, is not here involved. The ground upon which this power is sometimes denied is that a partnership implies the power of each partner, under his authority as a general agent for all the purposes of the partnership, to bind the others by his individual acts, whereas the statutes under which a corporation exists require its powers to be exercised by a board of directors, and preclude it from becoming bound by the act of the one who may be only its partner. There is, however, in the present case no question of agency in the management of the affairs of the corporation. The plaintiff paid the money to the appellant, and transferred to its appointee the title to the land, so that the entire management of the business contemplated by the contract was intrusted to the corporation itself. There is no rule of law that will preclude a corporation from entering into a contract with an individual, which will have the effect to carry out directly or indirectly the object of its incorporation, and to provide in that agreement that the gains or losses of the venture shall be borne equally by both parties. Section 354 of the Civil Code provides: "Every corporation, as such, has the power . . . 8. To enter into any obligations or contracts essential to the transaction of its ordinary affairs, or for the purposes of the corporation."

Whether a contract is "essential" to the transaction of its ordinary affairs, or for the purposes of the corporation, is to be determined by the corporation, or those to whom the management of its affairs is intrusted. If it is within the apparent scope of its organization, the fact that the contract has been entered into by it, or by its representative, is a determination on the part of the corporation that it is essential, and the corporation will not be permitted thereafter to question its effect. The appellant was incorporated for the purpose, among others, of selling or otherwise disposing of the lands upon Coronado beach, in blocks or lots. It had conveyed the lots in question to the Millers, and held mortgages thereon to a large amount. The property was encumbered with other liens; there was a possibility that insolvency proceedings would be commenced, either by or against the Millers, by which the securities held by the appellant would be impaired; the real estate market was inactive, and, as was soon ascertained, was in a falling condition; creditors were pressing their claims against some of the property, and the appellant was anxious to have the property disposed of, in order that

it might be freed from these obligations. Under these circumstances, it must be held that the contract was not only within the scope of its organization and essential to the transaction of its ordinary affairs, but that it was a prudent step on the part of the appellant for preserving the value of the securities which it had taken upon its sale of the lands.

The relation existing between the plaintiff and the Millers at the time of entering into the agreement cannot be made by the appellant a ground for repudiating its contract with the plaintiff. If it be assumed that, in making the contract with the appellant, the plaintiff violated his obligation to the Millers, that was a matter for which he was liable to them alone, and from which he could be released by them. After the contract between the plaintiff and the appellant has been fully executed without any objection on the part of the Millers, the appellant cannot allege the possibility of an objection on their part as a defense to its liability for its share of the losses, any more than it could have alleged such matter as a defense to the plaintiff's claim for his share of the profits, if there had been any profits realized from the venture.

Several rulings of the court during the progress of the trial are assigned as error, but none of them seems entitled to any extended consideration, nor could a different ruling upon the respective matters have changed the conclusion of the court.

The judgment and order are affirmed.

GAROUTTE and VAN FLEET, JJ., concurred.

Hearing in banc denied.

BEATTY, Ch. J., dissented from the order denying a hearing in banc.

SECTION VIII.—POWER OF A CORPORATION TO TAKE AND HOLD ITS OWN STOCK.

CURRIER v. LEBANON SLATE COMPANY.

IN THE SUPERIOR COURT OF JUDICATURE OF NEW HAMPSHIRE,
DECEMBER 22, 1875.

[Reported in 56 *New Hampshire Reports* 262.]

Duncan (with whom was *H. Bingham*) for the plaintiff.

Spring for the defendants.

SMITH, J.¹ 1. The vote of March 17, 1869, authorizing the directors to give the notes of the corporation to the amount of

¹ The statement of facts and a portion of the opinion have been omitted.
—Ed.

\$2,000, upon receiving from Liscomb a transfer of one hundred shares of his stock, was in effect a vote to release him from his subscription for so many shares, and to refund to him the amount he had paid thereon. The reason assigned to the stockholders why this should be done was that he had more stock than he was able to pay for, and unless he could have relief in some way, the company would be obliged to stop their works or hire money to carry them on. It was further represented that he would thus be enabled to raise money on the notes of the company, with which to pay the assessments on his remaining stock. It is not claimed by the defendants that the corporation intended, or that the effect of the note was, to reduce the amount of the capital stock, or to extinguish the one hundred shares transferred by Liscomb; but they claim that the corporation hold the shares so transferred as property, with power to reissue the same to any subscriber or purchaser thereof.

It distinctly appears that the whole amount of the capital stock, as fixed and limited by the corporation, has never been paid in. It is certain, therefore, that prior to March 17, 1869, the directors and treasurer could not make and subscribe a certificate under oath that the amount of the capital stock had been fully paid in, and cause the same to be recorded in the office of the clerk of the town where the corporation had its principal place of business, as required by chapter 135, section 20, General Statutes. Under section 8 of the same chapter, therefore, the stockholders were individually liable for all the debts and contracts of the corporation.

It is not distinctly found in the master's report whether the corporation, on March 17, 1869, had sufficient assets to meet all its liabilities. If it had not, the vote in question would be clearly illegal, and what has been done under it should be set aside. The funds of an insolvent corporation cannot be taken to buy in a portion of its capital stock at the expense of its remaining stockholders. It would be grossly inequitable to the other stockholders, and a fraud upon the creditors. Moreover, it is prohibited by ch. 135, sec. 3, Gen. Stats., which provides that no dividend shall be made, and no part of the capital stock shall be withdrawn or refunded to any of the stockholders, when the property of the corporation is insufficient, or will be thereby rendered insufficient, for the payment of all its debts; and by section 7 it is provided that any stockholder who shall receive any sum unlawfully withdrawn or refunded from the capital stock shall, to the amount by him received, be individually liable for all the debts of the corporation then existing or afterwards contracted, until the same is repaid, or paid to the creditors of the corporation.

2. But, assuming that this corporation, on March 17, 1869, was

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solvent, it becomes material to inquire whether the corporation could lawfully purchase of Liscomb one hundred shares of its capital stock, the assessments upon which he had been unable to meet.

In *Salem Mill Dam Corporation v. Ropes*, 6 Pick. 23, it is laid down that "no vote or act of a corporation can enlarge its chartered authority, either as to the subjects on which it is intended to operate, or the persons or property of the corporators. If created with a fund limited by the act it cannot enlarge or diminish that fund but by license from the legislature, and if the capital stock is parcelled out into a fixed number of shares, this number cannot be changed by the corporation itself. *Vide* 1 Dane's Abr., ch. 22, art. 1, and the numerous authorities cited by the author."

In *City Bank of Columbus v. Bruce*, 17 N. Y. 507, it appears that the Columbus Insurance Co., being in full operation, with a capital of \$300,000 (the amount authorized by its charter), voted through its board of directors that any stockholder indebted to the company on stock notes might have the privilege of paying any part or all of such indebtedness in the capital stock of the company, at a rate specified in the resolution. Under this authority stock was surrendered or transferred to the company in payment of notes to the amount of \$133,000. Selden, J., in delivering the opinion of the court, says: "There seems to be no ground for questioning the validity of this transaction. I am not aware of any common-law principle which forbids it; nor is it shown to have been in contravention of any provision of the charter of the company, or any other of the statutes of Ohio. In the case of *Taylor v. The Miami Exporting Company*, 6 Ohio, 83, it was held that a bank might receive its own stock in payment of a debt, and might hold it as it did its other corporate property."

I am not prepared to say that under the laws of this State a solvent corporation may not in good faith, and for the purpose of securing payment of a debt against a stockholder, which might not otherwise be collected without risk, delay, and expense, receive its own stock in payment therefor at its fair value, and hold the same as property; in which case it would not become extinguished, and might be reissued to the purchaser thereof. But this case differs widely from such a case. The object of the vote in question appears to have been, or was declared to be, not to collect a debt due to the corporation, but to afford relief to a stockholder by taking off his hands stock for which he had partially paid, but for which he was unable to complete the payments. This was done by hiring money for the purpose, or rather by giving him the notes of the corporation to be negotiated by him, and

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ultimately paid by the company, and against the protest of the plaintiff. It is difficult to see how the welfare of the corporation could be promoted by hiring money, or incurring further liabilities, to purchase in one-tenth of its capital stock, for which there had been no sale in the open market, and upon which no dividend had ever been declared, and for which it was extremely doubtful whether another purchaser could be found unless the affairs of the company should improve (a condition which appearances then hardly warranted). The inevitable result was to release Liscomb from paying into the treasury of the company the balance of the assessments then made, or to which the stock was liable, amounting to \$8,000.

It further appears from the report of the master that two hundred and fifty shares of stock were sold by the company for non-payment of an assessment. The defendant—Liscomb—admits that he bid this off at \$1 per share, and paid to the company the balance of the assessment, \$3. He says this was done after consulting some of the stockholders, but he does not claim that he had any legal authority to buy it for the company. The reason that he assigns—that unless he had done this the company would have been embarrassed, as no outside parties were present at the sale—shows that the stock had little, if any, value at the time. By the report of the master it also appears that Liscomb has, since March 17, 1869, claimed to recover the sum of \$1,000 so paid by him. It is not material to inquire upon what ground such a claim can be based. That question does not arise here, and the transaction is important only as bearing on the value of the stock, and the value of the stock is material as bearing upon the good faith with which the purchase by the company of the one hundred shares, October 17, 1869, was made.

If Liscomb was unable or unwilling to pay the assessments levied upon his stock, the statute afforded a remedy which the corporation was bound to pursue. A suit could undoubtedly have been maintained against him to collect the assessments; or under secs. 16 and 17 of ch. 134, Gen. Stats., the treasurer could proceed to advertise and sell the shares, or so many of them as might be necessary to pay the assessments then due, with necessary charges. If the stock had any value, it is fair to presume it would have sold for what it was worth, or for a price approximating to it. If the transaction by which the company bought one hundred shares of its stock at \$20 per share, was an honest transaction, the stock if sold in the market would undoubtedly have brought that sum, or somewhere near it. If it would not, it affords very strong evidence of collusion between Liscomb and a majority of the stockholders, by which this

plaintiff cannot be bound, especially in the face of his protest seasonably made.

The plaintiff charges such constructive fraud as courts of equity recognize, and for which they set aside engagements. The action of the company relieved Mr. Liscomb from his contract to pay the overdue assessments upon one hundred shares of stock, but it involved the company in a further debt of \$2,000 for one hundred shares of stock for which the company had no use, and which it is fair to presume others would have bought if they had possessed any value. The assets of the company were thus withdrawn and appropriated to an unlawful purpose, and at the same time the indebtedness of the company was increased. All this was done at the expense of the other stockholders, without the consent of the plaintiff, and against his protest. It seems clear to me that he has the right to call upon the court to interfere and prevent this wrong, and to restore matters, as far as may be done, to the condition in which they stood at that time.

The evidence shows that Adna Storrs was present at the meeting held March 17, 1869, and therefore knew the illegal nature of the consideration of the note for \$600 transferred to him by Liscomb. A decree should be entered in the circuit court that Liscomb and Storrs be enjoined from collecting or negotiating the note for \$1000 and the note for \$600; that they refund to the corporation all moneys received from the corporation, by either of them, on said notes, with interest from the time of such payments; that the company reconvey to Liscomb said one hundred shares of stock; and that the contract, by which Liscomb was released from payment of any sum or sums due from him to the company at the date of the purchase of said stock by said company be annulled and set aside.

CUSHING, Ch. J., and LADD, J., concurred.

Decree accordingly.

COPPIN v. GREENLEES & RANSOM COMPANY.

IN THE SUPREME COURT OF OHIO, JANUARY TERM, 1882.

[*Reported in 38 Ohio State Reports 275.*]

THE original action was brought by William Coppin, plaintiff in error against The Greenlees & Ransom Company, defendant in error, in the Court of Common Pleas of Hamilton County, and the cause of action was thus stated in the petition:

"The plaintiff states that the defendant is and for several years

past has been a corporation, duly incorporated under the laws of the State of Ohio, for manufacturing purposes.

"That it has been the custom of said corporation that its officers and others, actively engaged in its service, should be holders of shares of its stock, and upon ceasing to be connected with said company such persons have been accustomed to sell, and said company to buy their said stock.

"That the plaintiff was formerly in the employ of said company as a workman, and that while so engaged he became the holder of shares of the capital stock of said company to the amount, at its par value, of \$1,300.

"That having ceased to work for said company, he sought a purchaser for said stock, and offered to sell the same to the defendant for two lots of land, hereinafter described, valued respectively at \$1100 and \$700, and the balance of \$1500 in manufactured work to be made by the defendant, at ten per cent. off their bill of prices, to which the defendant assented and agreed, and to carry the same into effect the plaintiff on May 28, 1875, caused to be prepared a written contract, which the defendant then duly executed and delivered to the plaintiff, of which the following is a copy:

" 'CINCINNATI, May 28, 1875.

" 'For and in consideration of thirty-three shares of the capital stock in the Greenlees & Ransom Company, the receipt whereof is hereby acknowledged, said Greenlees & Ransom Company promise to pay, or cause to be paid, to William Coppin the sum of three thousand three hundred dollars, payable, viz.: Said Coppin to take a lot of ground, No. 46 on the plat of the Wyoming Land and Building Co.'s subdivision of the Burns farm, Wyoming, Ohio, in part payment, amounting to \$1100.00; also a lot of ground on the north side of Wyoming avenue owned by _____ Caruthers, and next to Mr. Beeson's house, fifty feet front by two hundred and forty-five feet deep, more or less, for the sum of \$700.00; leaving a balance of \$1500.00 to be paid in manufactured work, joist, scantling, etc., the manufactured work at ten per cent. off their bill of prices; the other material at the usual rates; the work and material to be delivered from time to time to him as said Coppin may order it.

" 'GREENLEES & RANSOM COMPANY,

" 'By E. P. RANSOM, President.'

"And the plaintiff says that afterwards, in the month of June, 1875, he tendered said shares of stock to the defendant, and offered to transfer the same to it, and demanded performance of said contract; but the defendant refused to accept the same, and refused to convey said lots, or either of them, or to deliver said

manufactured goods, although the plaintiff then demanded the same.

"Wherefore he now brings said stock into court, and offers to transfer the same to the defendant, and prays that the defendant may be compelled to convey said lots by a perfect title, and to deliver said goods, and for such other and further relief as in equity and good conscience he may prove to be entitled to."

To this petition an amendment was afterwards allowed and filed as follows:

"And now comes the plaintiff, William Coppin, and by leave of court files this amendment to his petition herein, and for such amendment says that the value of said land, and of said building material, was thirty-three hundred dollars.

"That said lots were worth respectively \$1,100 and \$700, and reaffirming all the allegations of his petition except such as may be inconsistent herewith, prays a judgment for said value of said land and building material, to wit: the sum of \$3,300, with interest from the 28th day of May, A. D. 1875, against the said defendant, and withdraws his prayer for specific performance."

After an issue of fact joined by answer the cause was tried, and verdict and judgment rendered in favor of the plaintiff for \$3,817.00.

On petition in error, the district court reversed the judgment of the Common Pleas, and caused it to be certified on the record "that the judgment of the Court of Common Pleas was reversed by this court on the ground that the petition and amendment to the petition failed to show a sufficient cause of action, and on the ground that the verdict was contrary to law," and not on the ground that the verdict was contrary to the evidence.

This proceeding is now prosecuted to reverse the judgment of the district court.

Hoadly, Johnson & Colston for plaintiff in error.

Stimmel & Davis for defendant in error.

McILVAINE, J. Whether the defendant corporation was bound by its executory agreement with the plaintiff to purchase shares of its own stock, under the circumstances detailed in the petition, was undoubtedly the question upon which the case turned in the district court.

The power of a trading corporation to traffic in its own stock, where no authority to do so is conferred upon it by the terms of its charter, has been a subject of much discussion in the courts; and the conclusions reached by different courts have been conflicting. Of course, cases wherein the power is found to exist by express or implied grant in the charter furnish no aid in the solution of the question before us; unless the claim of the plaintiff

can be sustained that such power was conferred on the defendant by section 63 of the Corporation Act of 1852 (S. & C. 301), as amended, which confers on manufacturing corporations the powers enumerated in section 3 of the act, and, among others, the power "to acquire and convey at pleasure all such real and personal estate as may be necessary or convenient to carry into effect the objects of the corporation." We think, however, that this claim cannot be maintained. The sole object of the defendant organization was "for manufacturing purposes;" and it cannot be said, in any just sense, that the power to acquire or convey its own stock was either necessary or convenient "for manufacturing purposes."

The doctrine that corporations, when not prohibited by their charters, may buy and sell their own stocks, is supported by a line of authorities; and prominent among them may be mentioned the cases of *Dupee v. Boston Water Power Co.*, 114 Mass. 37, and *C. P. & S. R. R. Co. v. Marsailles*, 84 Ill. 145. But nevertheless, we think the decided weight of authority both in England and in the United States is against the existence of the power, unless conferred by express grant or clear implication. The foundation principle upon which these latter cases rest is that a corporation possesses no powers except such as are conferred upon it by its charter, either by express grant or necessary implication; and this principle has been frequently declared by the Supreme Court of this State; and by no court more emphatically than by this court. It is true, however, that in most jurisdictions, where the right of a corporation to traffic in its own stock has been denied, an exception to the rule has been admitted to exist, whereby a corporation has been allowed to take its own stock in satisfaction of a debt due to it. This exception is supposed to rest on a necessity which arises in order to avoid loss; and was recognized in this State as early as *Taylor v. Miami Exporting Co.*, 6 Ohio, 176, and has been incidentally referred to as an existing right since the adoption of our present Constitution. *State v. Building Association*, 35 Ohio St. 258.

But, however that may be, the right of a corporation to traffic in its own stock at pleasure appears to us to be inconsistent with the principle of the provisions of the present Constitution, article 13, section 3, which reads as follows: "Dues from corporations shall be secured by such individual liability of stockholders, and other means, as may be prescribed by law; but, in all cases, each stockholder shall be liable, over and above the stock by him or her owned, and any amount unpaid thereon, to a further sum, at least equal in amount to such stock." Now, it is just as plain that a business or trading corporation cannot exist without stock and

stockholders, as it is that the creditors of such corporations are entitled to the security named in the Constitution. State *ex rel.* Att'y-Gen. *v.* Sherman, 22 Ohio St. 411. The corporation itself cannot be a stockholder of its own stock within the meaning of this provision of the Constitution. Nobody will deny this proposition. And if a corporation can buy one share of its stock at pleasure, why may it not buy every share? If the right of a corporation to purchase its own stock at pleasure exists and is unlimited, where is the provision intended for the benefit of creditors? This is not the security to which the Constitution invites the creditors of corporations. I am aware that the amount of stock required to be issued is not fixed by the Constitution or by statute, and also that provision is made by statute for the reduction of the capital stock of corporations; but of these matters creditors are bound to take notice. They have a right, however, to assume that stock once issued, and not called back in the manner provided by law, remains outstanding in the hands of stockholders liable to respond to creditors to the extent of the individual liability prescribed. In this view it matters not whether the stock purchased by the corporation that issued it becomes extinct or is held subject to be reissued. It is enough to know that the corporation, as purchaser of its own stock, does not afford to creditors the security intended. And surely, if the law forbids the organization of a corporation without stock because the required security is not furnished, it cannot be that having brought the corporation into existence, it invests it with power to assume at pleasure the identical character or relation to the public that was an insurmountable objection to the giving of corporate existence in the first place.

Plaintiff in error lays much stress on the averments in the petition, that it had been the custom of the corporation that its officers and others, actively engaged in its service, should be holders of shares of its stock, and upon ceasing to be connected with the company such persons had been accustomed to sell, and the company to buy, such stock; and that the plaintiff had purchased the stock for the price of which suit was brought while in the employment of defendant.

We cannot see why these averments should take the case out of the general rule.

If it were averred that the plaintiff had purchased this stock from the defendant, or from others, under an agreement with the company that it buy the same from him when he quit its employment, or if the contract of purchase by the defendant had been executed, very different questions would arise.

It is not even averred that the plaintiff relied upon such cus-

tom either in making the purchase, or the sale, of the stock; so that, in fact, he is unaffected by the alleged custom. But if such custom had been relied on by the plaintiff when he purchased the stock it would not have made the executory contract of the defendant to buy the stock binding, which, without such custom, would be void. The usage of a corporation does not become the law of its existence, or the measure of its powers. The general law of the State, of which all persons are presumed to have knowledge, is the source and limit of all its powers and duties; and these cannot be varied either by usage or contract. The doctrine of estoppel has no application in the case. Nor is there any such equity in the case, as would have arisen between the parties in case the contract had been executed.

Judgment affirmed.

TREVOR AND ANOTHER, APPELLANTS, v. WHITWORTH
AND ANOTHER, RESPONDENTS.

IN THE HOUSE OF LORDS, JULY 11, 1887.

[Reported in *Law Reports*, 12 *Appeal Cases* 409.]

APPEAL from a decision of the Court of Appeal.

Share
James Schofield & Sons, Limited, were incorporated in 1865 under the Companies Act 1862, with a capital of £150,000 in 15,000 shares of £10 each. The objects, as stated in the memorandum of association, were to acquire and carry on the business of certain flannel manufacturers, and any other businesses and transactions which the company might consider to be in any way conducive or auxiliary thereto, or proper to be carried on in connection therewith.

The memorandum did not authorize the company to purchase its own shares.

Several of the articles of association dealt with the purchase of shares by the company. In the view which the House took it is necessary to refer only to two.

Share
"Art. 179. Any share may be purchased by the company from any person willing to sell it, and at such price, not exceeding the then marketable value thereof, as the board think reasonable."

"Art. 181. Shares so purchased may at the discretion of the board be sold or disposed of by them or be absolutely extinguished, as they deem most advantageous for the company."

The company having in 1884 gone into liquidation in the Court of Chancery of the County Palatine of Lancaster, a claim was made against the company by the respondents, as executors of

Whitworth, a deceased shareholder, for the balance of the price of Whitworth's shares sold by the executors to the company in 1880, and not wholly paid for. The circumstances under which the purchase in question and other purchases by the company of its own shares were effected are stated in the judgments.

A summons having been taken out by the appellants, the official liquidators, to determine whether the claim ought to be allowed, the Vice-Chancellor of the County Palatine made an order declaring that, without prejudice to any claim by the claimants against any persons other than the liquidators and the company, the claim against the company ought not to be allowed.

The Court of Appeal (Cotton, Bowen, and Fry, L. JJ.) reversed this decision and allowed the claim. Against this decision the liquidators now appealed. The only question material to this report being the general question, whether such a company can purchase its own shares, the arguments on the other points are omitted.

Rigby, Q. C., and *O. Leigh Clare* for the appellants.

Romer, Q. C., and *A. C. Maberley* for the respondents.

HERSCHELL, L. My Lords, three questions are raised by this appeal: First, whether certain shares in James Schofield & Sons, Limited, were purchased by G. W. Schofield on his own account, or as agent for the company; secondly, whether, assuming that they were purchased for the company, and that the company had power to buy its own shares, the purchase had taken place in accordance with the articles of association; and thirdly, whether the company had power to purchase the shares.

James Schofield & Sons, Limited, was incorporated under the Companies Acts on the 31st of May, 1865, with a capital of £150,000 in 15,000 shares of £10 each. At an extraordinary general meeting of shareholders of the company on the 6th of May, 1884, it was resolved that the company should be wound up voluntarily, and on the 15th of May following it was ordered by the Vice-Chancellor of the County Palatine that the voluntary winding-up should be continued under the supervision of the court.

By an affidavit filed on the 1st of October, 1884, the respondents claimed from the company in the winding-up £2873 12s. A summons was taken out by the appellants for the purpose of determining whether this claim ought to be allowed. Upon the hearing of this summons the claim was rejected by the Vice-Chancellor, but, upon appeal, this decision was reversed.

On the 1st of May, 1880, G. W. Schofield bought from the respondents, who were the executors of Robert Whitworth, a deceased shareholder, 533 shares in the company (twenty-eight fully paid up, 500 with £6 paid, and five with £5 paid) for the price of

£3305, the purchase-money to be paid within three years then next, at such time as the buyers should appoint, and interest at 5 per cent. to be paid by the buyers until completion. Interest was accordingly paid in the meantime, and on the 3d of May, 1883, a transfer of the shares was executed by the vendors and G. W. Schofield.

On the 5th of May a receipt was given to G. W. Schofield for the sum of £3305 for shares bought. But £505 only having been in fact paid, a promissory note was on the same day given to the appellants for £2800 "deposited on loan at 5 per cent. per annum, interest from date." This was signed "for J. Schofield & Sons, Limited. G. W. Schofield, directors."

I pass now to the main question in this case, which is one of great and general importance, whether the company had power to purchase the shares.¹ The result of the judgment in the court below is certainly somewhat startling. The creditors of the company which is being wound up, who have a right to look to the paid-up capital as the fund out of which their debts are to be discharged, find coming into competition with them persons who, in respect only of their having been, and having ceased to be, shareholders in the company, claim that the company shall pay to them a part of that capital. The memorandum of association, it is admitted, does not authorize the purchase by the company of its own shares. It states, as the objects for which the company is established, the acquiring certain manufacturing businesses and the undertaking and carrying on the businesses so acquired, and any other business and transaction which the company consider to be in any way auxiliary thereto, or proper to be carried on in connection therewith.

It cannot be questioned, since the case of *Ashbury Railway Carriage and Iron Co. v. Riche*, Law Rep. 7 H. L. 653, that a company cannot employ its funds for the purpose of any transactions which do not come within the objects specified in the memorandum, and that a company cannot by its articles of association extend its power in this respect. These propositions are not and could not be impeached in the judgments of the Court of Appeal, but it is said to be settled by authority, that although a company could not under such a memorandum as the present, by articles authorize a trafficking in its own shares, it might authorize the board to buy its shares "whenever they thought it desirable for the purposes of the company," or "in cases where it was incidental to the legitimate objects of the company that it should do so." The former is Lord Justice Cotton's expression; the latter that of Lord Justice Bowen.

¹ Only so much of the opinion is given as relates to this question.—Ed.

I will first consider the question apart from authority, and then examine the decisions relied on.¹

The Companies Act 1862 requires (sec. 8) that in the case of a company where the liability of the shareholders is limited, the memorandum shall contain the amount of the capital with which the company proposes to be registered, divided into shares of a certain fixed amount; and provides (sec. 12) that such a company may increase its capital and divide it into shares of larger amount than the existing shares, or convert its paid-up shares into stock, but that "save as aforesaid, no alteration shall be made by any company in the conditions contained in its memorandum of association."

What is the meaning of the distinction thus drawn between a company without limit on the liability of its members and a company where the liability is limited, but, in the latter case, to assure to those dealing with the company that the whole of the subscribed capital, unless diminished by expenditure upon the objects defined by the memorandum, shall remain available for the discharge of its liabilities? The capital may, no doubt, be diminished by expenditure upon and reasonably incidental to all the objects specified. A part of it may be lost in carrying on the business operations authorized. Of this all persons trusting the company are aware, and take the risk. But I think they have a right to rely, and were intended by the legislature to have a right to rely, on the capital remaining undiminished by any expenditure outside these limits, or by the return of any part of it to the shareholders.

Experience appears to have shown that circumstances might occur in which a reduction of the capital would be expedient. Accordingly, by the act of 1867 provision was made enabling a company under strictly defined conditions to reduce its capital. Nothing can be stronger than these carefully-worded provisions to show how inconsistent with the very constitution of a joint-stock company, with limited liability, the right to reduce its capital was considered to be.

Let me now invite your Lordships' attention to the facts of the present case. The company had purchased, prior to the date of the liquidation, no less than 4142 of its own shares; that is to say, considerably more than a fourth of the paid-up capital of the company had been either paid, or contracted to be paid, to shareholders, in consideration only of their ceasing to be so. I am quite unable to see how this expenditure was incurred in respect of or as incidental to any of the objects specified in the memorandum. And, if not, I have a difficulty in seeing how it can be justified. If the claim under consideration can be supported, the

¹ The examination of decisions has been omitted.—Ed.

result would seem to be this, that the whole of the shareholders, with the exception of those holding seven individual shares, might now be claiming payment of the sums paid upon their shares as against the creditors, who had a right to look to the moneys subscribed as the source out of which the company's liabilities to them were to be met. And the stringent precautions to prevent the reduction of the capital of a limited company, without due notice and judicial sanction, would be idle if the company might purchase its own shares wholesale, and so effect the desired result. I do not think it was disputed that a company could not enter upon such a transaction for the purpose of reducing its capital, but it was suggested that it might do so, if that were not the object, but it was considered for some other reason desirable in the interest of the company to do so. To the creditor, whose interests, I think, secs. 8 and 12 of the Companies Act were intended to protect, it makes no difference what the object of the purchase is. The result to him is the same. The shareholders receive back the moneys subscribed, and there passes into their pockets what before existed in the form of cash in the coffers of the company, or of buildings, machinery, or stock available to meet the demands of the creditors.

What was the reason which induced the company in the present case to purchase its shares? If it was that they might sell them again, this would be a trafficking in the shares, and clearly unauthorized. If it was to retain them, this would be to my mind an indirect method of reducing the capital of the company. The only suggestion of another motive (and it seems to me to be a suggestion unsupported by proof) is that this was intended to be a family company, and that the directors wanted to keep the shares as much as possible in the hands of those who were partners, or who were interested in the old firm, or of those persons whom the directors thought they would like to be among this small number of shareholders. I cannot think that the employment of the company's money in the purchase of shares for any such purpose was legitimate. The business of the company was that of manufacturers of flannel. In what sense was the expenditure of the company's money in this way incidental to the carrying on of such a business, or how could it secure the end of enabling the business to be more profitably or satisfactorily carried on? I can quite understand that the directors of a company may sometimes desire that the shareholders should not be numerous, and that they should be persons likely to leave them with a free hand to carry on their operations. But I think it would be most dangerous to countenance the view that, for reasons such as these, they could legitimately expend the moneys of the company to any extent they

please in the purchase of its shares. No doubt if certain shareholders are disposed to hamper the proceedings of the company, and are willing to sell their shares, they may be bought out; but this must be done by persons, existing shareholders or others, who can be induced to purchase the shares, and not out of the funds of the company.

It is urged that the views I have expressed are inconsistent with the forfeiture and surrender of shares in a company. I do not think so. The forfeiture of shares is distinctly recognized by the Companies Act, and by the articles contained in the schedule, which in the absence of other provisions regulate the management of a limited liability company. It does not involve any payment by the company, and it presumably exonerates from future liability those who have shown themselves unable to contribute what is due from them to the capital of the company. Surrender no doubt stands on a different footing. But it also does not involve any payment out of the funds of the company. If the surrender were made in consideration of any such payment it would be neither more nor less than a sale, and open to the same objections. If it were accepted in a case when the company were in a position to forfeit the shares, the transaction would seem to me perfectly valid. There may be other cases in which a surrender would be legitimate. As to these I would repeat what was said by the late Master of the Rolls in *In re Dronfield, etc., Co.*, 17 Ch. D. 76: "It is not for me to say what the limits of surrender are which are allowable under the act, because each case as it arises must be decided upon its own merits."

I move your Lordships that the judgment appealed from be reversed, and the judgment of the Vice-Chancellor restored, and that the respondents do pay to the appellants the costs in the Court of Appeal and in this House, and do repay to the appellants any moneys and costs received from them.¹

MORGAN v. LEWIS.

IN THE SUPREME COURT OF OHIO, JANUARY 26, 1888.

[*Reported in 46 Ohio State Reports 1.*]

RESERVED from the District Court of Stark County.

The action below was commenced by Lewis, one of the defendants in error, against the Alliance Rolling Mill Co. and other defendants alleged to be stockholders in, or creditors of, the com-

¹ The concurring opinions of Lords Watson, Fitzgerald, and Macnaghten have been omitted.—ED.

pany, for the purpose of enforcing the statutory liability of the stockholders to contribute to the payment of the debts of the corporation, which was alleged to be insolvent, and to have assigned its property and ceased to do business.

The case was referred; there was a trial before the referee, and Morgan, the plaintiff in error, was held as a stockholder. He excepted, and had a bill of exceptions signed by the referee. On hearing, the Court of Common Pleas affirmed the referee's report, Morgan excepting. He then presented a petition in error in the district court where the case was reserved for decision in this court.

In Morgan's answer he says:

"That many years ago, to wit: About the year 1870, he owned about two-hundred shares of stock in said company and no more. That soon thereafter, to wit: On or about January 1, 1871, he sold and disposed of all his stock in said company and ceased to be a stockholder therein. . . . He denies that the indebtedness described in the petition, or any portion thereof, was contracted while he was a stockholder in said company, and he denies that any indebtedness held by the defendants who claim to be creditors of said company, or by any other person making claims in this action to be a creditor or creditors of said company, was contracted during the time that he was a stockholder in said company, or until many years after he had ceased to be such stockholder. He alleges the fact to be that all debts existing against said company, during the whole time that he was a stockholder therein, have long since been fully paid." . . . Issue was joined with these averments.

Upon the trial before the referee, Morgan offered to prove that prior to the time the Alliance Rolling Mill Co. acquired title to the furnace property the property was principally owned by the defendant, Morgan, and that for his interest in the furnace property the Alliance Rolling Mill Co. issued to the defendant, Morgan, stock in the Rolling Mill Co., which stock was the same stock which was afterward transferred by the defendant, Morgan, to the Alliance Rolling Mill Co. in consideration of the retransfer to him of the furnace property. And further offered to prove, that after the Alliance Rolling Mill Co. acquired title to the furnace property, the furnace not proving as successful and profitable as had been expected, some of the stockholders were dissatisfied with the purchase from Morgan, and contentions arose among them, and the defendant, Morgan, was blamed by many of them for having gotten the company into the purchase and was requested to take the property off their hands and pay for it in stock of the company; and that Morgan, for the sake of settling such

contentions and dissatisfaction, did purchase the furnace and pay for it in stock which had been issued to him as shown by the record. And thereupon the referee sustained the objection to the evidence so offered, and defendant, Morgan, excepted.

It was testified to before the referee, and not contradicted, that Morgan transferred his stock to the company and the latter deeded to him the furnace property, of which he took immediate possession, and which he continued to hold and use as his own.

No action has been taken looking to the subjection of this furnace property to the payment of the claims of any creditors, but all parties have treated it as if it were the property of Morgan since it was so deeded to him.

In his report the referee finds that between February 5, 1867, and January 2, 1871, Morgan became the legal owner and holder of \$116,583 worth (at par value) of stock in the company. That on the 17th of January, 1872, "by a resolution of the said board of directors, the president of said corporation, by deed duly executed, deeded the furnace property mentioned in said proposition to said David Morgan, and on the same day said David Morgan signed powers of attorney in blank, transferring said stock, and delivered up the certificates of the same to the secretary of the corporation, who wrote the word 'cancelled' on the face of each certificate, and inserted said certificates in the stock certificate book of the corporation, as surrendered stock.

"That at the time of said delivery of said certificates of stock to said corporation said David Morgan was the legal owner of said stock represented thereby.

"That said stock so delivered and intended to be surrendered to said corporation, was never afterward represented, and the same was completely merged in said corporation, and the capital stock of said corporation was treated by the directors as reduced by the amount of \$116,583.

"Said transaction was with the directors of said corporation alone, and without any submission of the same to, or vote on the same by, the general stockholders of said corporation, and without any knowledge or assent of the general stockholders, and that no certificate of decrease was filed with the Secretary of State as required by statute, nor was any notice of the action of the directors ever given.

"That at the time of said attempted surrender said corporation was reported to be solved.

"That said David Morgan bought said property from, and intended to transfer said stock to, said corporation in good faith and without fraudulent intent.

CONCLUSIONS OF LAW.

"The transfer of this stock to the corporation had the effect of reducing the capital stock of the corporation; the directors of the corporation did not have the power to thus reduce the capital stock, and such transfer is void and of no effect, and left the title to said \$116,583 of stock precisely where it had been, and the same as if no effort had been made to transfer the same.

"Unless the power to buy its own stock is expressly conferred in its charter, a corporation cannot deal in its own stock, and such transactions are void.

"The fund arising from the individual liability of stockholders is a trust fund set apart under our Constitution and statutes for the benefit of creditors, and the directors by no arrangement or dealing whatever can affect or impair this fund.

"I find David Morgan liable on account of said stock, to contribute to the payment of the claims of the creditors of said corporation, to the amount of \$116,583."

The referee finds in another connection that the capital stock of the company was increased from time to time, until in December, 1870, when it was increased to \$450,000.

The fact that Morgan took immediate possession of the furnace property upon its conveyance to him, is not found by the referee, and does not seem to have entered into the consideration of the case by him, or by the Court of Common Pleas.

It also appeared in the case that the claims of creditors all accrued after the transfer by Morgan of his stock to the company, and of the furnace property, by the latter, to him.

Stevenson Burke and William B. Sanders for plaintiff in error.

W. A. Walden and J. F. Hoffman for defendant in error.

OWEN, Ch. J. We are of opinion, however, that the referee erred in excluding the evidence which Morgan offers, to throw light upon the transaction by which he assumed to acquire the furnace, and transfer his stock to the company.¹

The contention of Morgan, in this respect, is not answered by the proposition that the only purpose of offering the rejected proof was to show that the transaction was in good faith, and that this already sufficiently appeared. We have no disposition to call in question the general and well recognized principle that a corporation cannot buy its own stock. It is conceded that this principle proceeds upon a want of power, rather than upon any express prohibition in its charter. With this general principle conceded, however, the right of a corporation to take its own stock in satisfaction of a debt due to it, has long been recognized in this State.

¹ Only so much of the opinion is given as relates to this question.—Ed.

This has been recognized as an exception supposed to rest upon the necessity of avoiding loss. *Coppin v. Greenlees*, 38 Ohio Stat. 279. It is, nevertheless, a relaxation of the general rule. It is, of course, because of the necessity of avoiding loss, and not because it is for the satisfaction of a debt, that the exception is recognized. If the same or a like necessity of avoiding loss should arise in any of the transactions of the company, it could not, with any show of reason, be contended that the application of this principle of necessity should be limited by any iron rule to the case of taking stock for an otherwise hopeless debt.

The evidence which Morgan offered, and the referee rejected, tended to establish, in substance, that Morgan had traded to the company this furnace property for stock; that the furnace promised to prove a failure, or, at best, a disappointing and unsatisfactory venture. Contentions arose over the transaction, between Morgan and some of the stockholders. Many of them blamed him for having induced the company to make the purchase. Thereupon they—"many stockholders"—simply proposed a rescission of the contract of purchase; that Morgan take back the furnace and restore to the company the stock he had received for it. The company was out of debt. Nobody could possibly be hurt by a rescission of this contract which had caused so much discontent and contention, and which promised to be a losing venture for the company and Morgan's fellow stockholders. This proof would have established something beyond the mere good faith of the transaction. It would have tended to establish the fact that Morgan yielded to the importunities of many stockholders to rescind a bargain and set at rest an unfortunate controversy which was rapidly breeding discord among the stockholders.

The finding of the referee, that this transaction itself worked a reduction of the capital stock of the company, is not tenable. There was nothing in the way of the company reissuing this stock or its equivalent to others who may have desired it. There was nothing in the fact that these certificates were marked "cancelled" on the face, by the secretary of the company, and by him treated as surrendered stock, to authorize the finding that the capital stock of the company was reduced. This was no part of the transaction with Morgan, and there was nothing in the fact of the re-exchange of the stock for the furnace which called upon the officers of the company to treat the stock as cancelled, or the capital *pro tanto* reduced. Green's Brice's *Ultra Vires*, 2d ed., 191, 192. This conclusion is not, in principle, qualified by the fact that the stock was not in fact thereafter represented. Then, we should not lose sight of the fact that there was an executed transaction. The exchange—or the re-exchange, rather—had

been made, possession of the furnace taken by Morgan, and retained by him for years before the transaction was questioned by any one. To this day it has remained free from direct attack. Certainly, the possession by Morgan of this property which had theretofore been in the possession of the company, was a circumstance proper to be considered with other facts in the case. It at least helps us to distinguish it from the case of *Coppin v. Greenlees*, 38 Ohio Stat. 275, relied upon by defendants in error. In that case it was held that: "An executory agreement between a manufacturing corporation of this State and one of the stockholders, for the purchase of the stock of such corporation, by the former from the latter, cannot be enforced, either by action for specific performance or for damages." That this presents a very different case from one of an executed contract is emphasized by the following language of McIlvaine, J., by whom the opinion was prepared: "If it were averred that the plaintiff had purchased this stock from the defendant, or from others, under an agreement with the company that it buy the same from him when he quit its employment, or if the contract of purchase by the defendant had been executed, very different questions would arise." In *State v. Building Association*, 35 Ohio Stat. 263, the general principle that a corporation may not traffic in its own stock is recognized. Yet in the same connection it is said: "We do not deny that a corporation has power to receive shares of its stock as security for a debt or other similar purposes." 26 Ga. 28; 84 Ill. 145; 17 N. Y. 507; 114 Mass. 37; 18 Vt. 131. It is apparent from the foregoing that no inflexible rule has been recognized by this court, that a corporation may not in any case, nor for any purpose, receive its own stock. On the contrary, the way is left open for the application of exceptions to the general rule in proper cases. It is one of the established facts in the case that all the debts which are sought to be satisfied by this proceeding were contracted subsequently to the transaction which is assailed. The transfer of the furnace property from the possession of the company to that of Morgan was a fact to which persons giving credit to the company could not safely close their eyes. The inquiry which it would naturally excite would have led to the information that the trade by which the company secured the furnace, and Morgan the stock, had simply been rescinded and the property—stock and furnace—re-exchanged. It being the law of our State that there are exceptions to the general rule that corporations may not deal in their own stock, all persons dealing with this company must be held to have done so in the light of this state of the law. All persons are as much presumed to know of exceptions to a principle as of the principle itself. The slightest inquiry would have re-

vealed the fact, that, as between himself and the company, Morgan did not sustain the relation of stockholder, at the time these debts were contracted.

In the light of this state of adjudication in this court, we do not hesitate to say that the peculiar state of circumstances, which Morgan offered to prove before the referee, ought to have been received in evidence and considered in the light of other facts which did appear, in order that the referee and courts could have had an opportunity to say whether they did not bring the case within some of the well founded exceptions to the wise and well established general rule.

Judgment reversed and cause remanded.

SPEAR, J., dissents from the second proposition of the syllabus, and the judgment of reversal.

WILLIAM S. VENT AND ANOTHER v. DULUTH COFFEE & SPICE CO.

IN THE SUPREME COURT OF MINNESOTA, MAY 5, 1896.

[*Reported in 64 Minnesota Reports 307.*]

APPEAL by defendant from an order of the District Court for St. Louis County, Ensign, J., denying a motion for judgment notwithstanding the verdict from an order denying a motion for a new trial. Affirmed.

Cotton, Dibell & Reynolds for appellant.

Henry S. Mahon and J. L. Washburn for respondents.

CANTY, J. On April 23, 1894, plaintiffs and the defendant corporation (then called the Smith & Coulter Spice Co.) entered into the following agreement: "Parties of the first part [plaintiffs] agree to take five thousand (\$5000) dollars' worth of capital stock of the Smith & Coulter Spice Co.'s stock at par value, to be paid for on or before May 1st, '94, which is to represent one-fourth interest in all assets of the company at this date. Parties of the second part [defendant] agree that on April 1st, 1895, if said parties of the first part are dissatisfied with the said stock or interest in said company, that the said Smith & Coulter Spice Co. will take stock from said parties of the first part, and pay them par value in cash for said stock, or interest in said company; parties of the first part to give notice by April 15th, 1895, and parties of the second part to have sixty days from said notice to pay for said stock." Pursuant to this agreement, defendant issued the \$5000 of its stock to plaintiffs, who paid for the same in full. The name of

the defendant has since been changed to the Duluth Coffee & Spice Co. On April 1, 1895, plaintiffs notified defendant that they were dissatisfied with the stock, offered to return the same, and demanded that they be paid the price of the same. On April 14 the demand was renewed, and the stock again offered to defendant. Defendant has not accepted the stock, or paid for the same, and after the sixty days mentioned in the contract, this action was brought to recover the \$5000 so paid for the stock. On the trial the court ordered a verdict for plaintiffs for the amount claimed. From an order denying its motion for a new trial, defendant appeals.

We are of the opinion that the evidence conclusively establishes all of the foregoing facts, and the only point raised by appellant worthy of consideration is the contention that the part of the contract by which defendant agreed to purchase or accept a surrender of its own stock is *ultra vires* and void. There is no express provision in its articles of incorporation authorizing defendant to buy or deal in its own stock, and whether an original, independent contract, by which it agreed to purchase its own stock, would be *ultra vires*, we need not consider. This is not such a case. This provision of the contract constituted a material and substantial part of the consideration and inducement for the purchase of the stock by plaintiffs, and if the provision is void, it seems to us that it vitiates the whole contract, and is a sufficient reason for the rescission of that contract and the return of the purchase price, which purchase price plaintiffs are demanding. But the better opinion, it seems to us, is that which holds the original contract to be a conditional sale, with the option to revoke or rescind in the purchaser. In *Browne v. St. Paul Plow Works*, 62 Minn. 90, 64 N. W. 66, we held that a similar contract was not *ultra vires*. There is no question here as to the rights of the creditors.

Order affirmed.

SECTION IX.—POWER TO TAKE AND HOLD STOCK IN ANOTHER CORPORATION.

THE CENTRAL RAILROAD CO. *et al.*, PLAINTIFFS IN ERROR
v. STEPHEN COLLINS *et al.*, DEFENDANTS IN ERROR.

IN THE SUPREME COURT OF GEORGIA, DECEMBER TERM, 1869.

[Reported in 40 Georgia Reports 582.]

Lyon, De Graffenried & Irvin; Jackson, Lawton & Bassinger;
Hartridge & Chisolm, Harden & Levy, Johnson & Montgomery
for plaintiffs in error.

Whittle & Gustin, R. Toombs, Nesbits & Jackson, W. H. Hull, I. L. Harris, O. A. Lochrane for defendants.

McCAY, J.¹ This is a bill filed by certain stockholders in the Central Railroad, certain stockholders in the Southwestern Railroad, and certain other persons who claim to come before the court as citizens of the State of Georgia, and as such to be interested in the relief sought by the bill.

The substance of the charges is that the Central Railroad and Banking Co., and the Southwestern Railroad Co., the former chartered to build and maintain a railroad from Savannah to Macon, and the latter chartered to build and maintain a railroad from Macon to the Chattahoochee River, are about to purchase from the city of Savannah, certain stock, including twelve thousand three hundred and eighty-three shares in the Atlantic & Gulf Railroad Co., a company chartered to build a railroad from Savannah to Bainbridge, with the intent and purpose on the part of these two companies to use the stock thus purchased to affect the management of the Atlantic & Gulf Road. 12 383

The answers admit, in substance, the charges; but the injunction is sought to be dissolved on the ground that there are not proper parties to the bill, and on the further ground that said Central Railroad and Banking Co., and Southwestern Railroad Co., have a right under their charters to make such a purchase.

There are, it is true, some other points made in the demurrer and motion to dissolve, but in the view taken of the case by the majority of the court, these are the essential questions:

1. Upon the question of parties, we agree that the citizens, in their character as such, are not proper parties to this proceeding. The State as one of the stockholders of the Atlantic & Gulf Road is a proper party; but the simple citizen, who has no other interest, has not, as it seems to us, any rights in this controversy. This is a simple attempt to enjoin the making of a certain contract, a mere private suit, in which no one has a right to be heard that is not interested in the decree. The wrong done the public by the alleged violation of the charter cannot be reached in this proceeding except so far as it affects the interest of those whose pecuniary rights are affected by the proposed contract. a private cit can not interfere

But the stockholders in the Central and Southwestern Railroad companies, and the Atlantic & Gulf Road and its stockholders, are proper parties. The former allege that this contract is a violation of their rights under the several charters, and the latter that it is injurious to its rights that these two rival roads should be

¹ The statement of facts, a portion of the opinion of McCay, J., the concurring opinion of Brown, J., and the dissenting opinion of Warner, J., have been omitted.—Ed.

permitted to acquire so controlling an interest in the management of its road. As this ground of the motion to dissolve is in the nature of a general demurrer, to be good it ought to show there are no proper parties to the bill.

2. We think the stockholders of the several roads are proper parties, have a good cause of complaint, and we therefore think the court did right to overrule the motion on this ground.

We do not think the profitableness of this contract, to the stockholders of the Central and Southwestern Railroad stockholders, has anything to do with the matter. These stockholders have a right, at their pleasure, to stand on their contract. If the charters do not give to these companies the right to go into this new enterprise, any one stockholder has a right to object. He is not to be forced into an enterprise not included in the charter.

That it will be to his interest is no excuse; that is for him to judge. By becoming a stockholder he has contracted that a majority of the stockholders shall manage the affairs of the company within its proper sphere as a corporation, but no further; and any attempt to use the funds or pledge the credit of the company not within the legitimate scope of the charter, is a violation of the contract which the stockholders have made with each other, and of the rights—the contract rights—of any stockholder who chooses to say, "I am not willing." It may be that it will be to his advantage, but he may not think so, and he has a legal right to insist upon it that the company shall keep within the powers granted to it by the charter. 1 Shelford on Railways, 71; 1 My. & K. 162, 163; 4 Y. & Coll. 618; 2 Dan. P. C. 521; 5 Hill, 386; 18 Barbour, 318; 43 N. Hamp. 525; 6 Angel & Ames on Corp., 4th ed., and cases cited.

3. The real question in this case is as to the power of these two companies under their charters, each of which defines the object of the incorporation to undertake the management of not only a wholly new enterprise from that set forth in the charter, but an enterprise chartered by the legislature evidently in rivalry with these two roads.

4. The question then before us is simply this: Has the Central Railroad Co., under its charter, after its banking powers have ceased, the right to make a contract with the city of Savannah by which it shall become the owner of twelve thousand three hundred and eighty-three shares of the Atlantic & Gulf Railroad, a road running also from Savannah to the interior of the State, to wit: to Bainbridge on the Flint River. The right to make this contract is denied by Mr. Collins, Mr. Hull and others, stockholders in the Central Railroad and Southwestern Railroad companies, who do not consent to the same, and insist upon it that

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it is a violation of their rights under the charter for two reasons: First, that it is a contract *ultra vires*, beyond the powers granted in the charter. Second, that it is a contract contrary to the public policy of the State, and therefore void. //

It is replied to this that the bill and answer show that the Atlantic & Gulf Railroad Co. is so managing its affairs, in carrying freights at ruinous rates from Bainbridge, as materially to injure the Central Railroad Co., and that the intent of this contract is merely to enable the Central Railroad Co. to protect itself; that it is, in truth, necessary for self-preservation, and that the power to make it is desirable, from its expressly granted power to maintain its own road, that the power granted in the charter to "have, purchase, receive, possess, enjoy, and retain to them, and to their successors, lands, rents, tenements, goods, chattels, and effects, of whatsoever kind, nature, and quality the same may be, and the same to sell, grant, demise, alien, or dispose of," is an indefinite grant to purchase and hold any kind of property whatsoever, and that this was so contemplated by the charter, because the power to purchase and hold lands is by a proviso restricted to such lands as it may acquire, in satisfaction of debts due it, and such as may be necessary and proper for laying, building, and sustaining the railroad.

At first blush, this last position seems a very strong one; but upon a close examination of the whole section in which these words are found, and especially upon viewing them in the light of the long and well established rules for the construction of acts of incorporation, the argument will appear more specious than sound.

5. The words immediately preceding those relied on are: "For the purpose of laying, building and making a railroad communication from the city of Savannah to the interior of the State," the subscribers, etc., "are made capable and able in law, to have, purchase, receive, possess and enjoy lands, rents," etc., etc. The purposes of the charter are to enable the company to build and maintain the railroad, and it is for this purpose, and for this purpose only, any of its powers are granted. For this purpose it may acquire and hold any kind of property whatsoever, but for any other purpose it cannot only not acquire any kind of property, but the company itself has no existence whatever. These are the words of the charter. Nor is there anything in this detailed specification of the things which the company may own and possess that at all enlarges the purposes for which it may own and possess them. Even without these words the company would have just the same powers. Every corporation "for the purposes declared by the charter," might, by the common law, hold and possess any

kind of real and personal property, and make any kind of a contract whatsoever. Angel & Ames on Corporations, 125, 251. But for any other purpose it could hold nothing, and could make no contract of any kind. Angel & Ames on Corporations, 251, 252. Nor is there anything in the proviso limiting the quantity of real property which the company may purchase and hold which enlarges the objects and purposes for which the company may purchase, hold and sell any kind and amount of personal property. The real estate which it may hold is limited in quantity, the personal is not.

It is true that the restraining words as to real estate are themselves very broad, to wit, "Shall not hold more real estate than may be necessary and proper for the purpose of laying, building, and sustaining said railroad;" but the fact that the legislature added other words, to wit, "And such as shall be *bona fide*, mortgaged or conveyed to it in satisfaction of debts," etc., shows conclusively that the words "building, laying, and sustaining" in the proviso, were intended to confine the company in its purchase and holding of real estate to such as was necessary to lay the track upon, build the usual offices, stations, shops, and depots upon, etc., and not in the enlarged sense in which they are used in declaring the purpose for which the charter is granted.

To give to these latter words the meaning contended for, to wit, that they enlarge the powers granted as to personal property, indefinitely, so that the company may purchase and hold personal property for any purpose, would be to make the Central Railroad and Banking Company a corporation for any purpose whatever. It might, with the same reason, own steamships, take contracts for house-building, buy and sell cotton, open commission houses, keep hotels, buy and sell fancy stocks, or engage in any business or enterprise whatever, that the cupidity of its directors, or their fancy or their folly might suggest to them. It is either confined in all its powers to the purposes and objects for which the charter is granted, or it is not confined to any particular purpose whatever, save that it shall not hold more than a certain quantity of real estate. Either the Central Railroad Co. is, like other corporations, limited in the enterprises which it may undertake and the property which it may possess and the contracts which it may make, to such as come fairly within the scope and purposes of the charter, or it is without any limit at all, and the legislature of 1835 has been guilty of the folly of granting a charter, indefinite in duration, with an immense capital, and capable, if it so desires, of engaging in any enterprise it pleases. I cannot so construe this charter. The very first words of it define and limit the purposes and objects for which all its powers are

given, and the 24th section expressly provides that after its banking powers have ceased, it shall only "be and remain incorporate and vested as to its own works, with the estates, rights, powers, and privileges granted by the act."

But it is said that the power to purchase this stock is derivable from the power expressly given to "maintain the road;" that it is necessary for the self-preservation of the road, and arises by implication from the very purposes and objects for which the charter was granted. The basis of this argument is that it is necessary for the "maintaining" of the Central Railroad, that it shall take a decided part in the "management and maintaining" of the Atlantic and Gulf Railroad, and as by the admitted rules of the common law, a corporation may make all contracts necessary, either directly or incidentally, to enable it to effect the purposes of its creation, therefore it has the power to purchase enough of the stock of the Atlantic and Gulf Railroad to enable it to protect itself by controlling the unwise management of the Atlantic and Gulf Railroad.

The purposes of the charter of the Central Railroad are the "laying, building, and making" the road. The words of the charter do not in express terms include the "maintaining and sustaining" it, but we do not doubt they are included, since the "maintaining and sustaining" are necessary to the very objects of the grant. But what does a grant to maintain and sustain a railroad include? Can it in any fair sense be construed to authorize the engaging in any enterprise which will extend the business or lessen the rivalries of the company? If this be so, the whole doctrine so frequently and so emphatically stated in the books and decisions is a sham. The "maintaining and sustaining" of the road has reference to keeping it in repairs, supplying it with machinery, and such like acts, and not to projects for extending its business, by schemes and enterprises not contemplated and expressed in clear, unambiguous terms, by the charter itself.

Every charter of a private corporation is a contract, first, between the State and the corporation—to which each is solemnly bound—the State that it will not impair the obligation, the corporation that it will perform the objects of its incorporation and keep within the powers granted to it (4th Wheaton, 518); secondly, between the stockholders themselves. The stockholders are bound to consent to the management of the affairs of the corporation by the majority, and by the by-laws which that majority makes. And the whole, on the other hand, agree with each other, that they will apply the funds of the company to the objects and purposes of the charter, and not otherwise. *Young v. Harrison,*

6 Ga. R., 130. Both as to the State and between the corporators, the law of this contract is the charter. The State has granted to it no rights, and the individual stockholders have clothed it with no rights, except such as are clearly and expressly set down in the charter. 13 Penn. 133; 28 Penn. 352; 18 Howard, 341.

Corporators are too apt to forget this fundamental law of their being. In the daily habit of transacting business, in the name of the company as though it were an individual, they are apt to slide into the notion that a corporation is an individual in all respects, so far as business matters are concerned.

But a corporation is a mere creature of the law, and only exists at all for the purposes declared in its charter, and has absolutely no powers but those which the law confers upon it. It is a creation of the law, and in the very nature of things is just what the law makes it, no more, no less; and by the word law here, I do not mean the general law which regulates the powers of persons, but the act of incorporation, the charter, the constitution.

There are certain general rules which have, time out of mind, been adopted by the courts in their investigation of the powers of incorporations, that it may be well to notice. 1. As a corporation is the mere creature of the act of incorporation, it has no other powers except such as are in said act expressly granted, or are necessary to effect the ends and objects of its existence. 2. Charters being private acts, or rather contracts between the public and individuals, the charter is to be strictly construed, nothing is to be taken by intendment or inference. Being a creature of the law, it is made up of just such rights as its charter gives it; not that every power which it possesses must be granted in detail, but it is confined in its operations to the objects and purposes expressly set forth in its charter, and it can undertake no other enterprise than is there expressly mentioned. *Frederick et al. v. City Council of Augusta*, 5 Ga. 561; *Mayor, etc. v. Macon & W. R. R. Co.*, 7 Ga. 221; 8 Ga. 23; 9 Ga. 213; *Winter v. Mus. R. R.*, 11 Ga. 438.

The books are full of decisions in illustration of these positions. In the case of the *East Anglian Railroad Co. v. East. Count. Railroad Co.*, 7 English Law and Equity Reports, 505, the charter was for the "purpose of making and maintaining" a particular railway. The company had leased another railway, and had covenanted to pay the costs of soliciting bills then pending in Parliament, by which the other railway should have power to make extensions and branches, and the action was for a breach of the covenant to pay said costs. *Jervis, Ch. J.*, in deciding the case, says: "It is clear the defendants have a limited authority only, and are a corporation only for the purpose 'of making and

maintaining' the railway sanctioned by the act, and that their funds cannot be applied for any other purpose than that directed by the act. Indeed, it is not contended that a company so constituted can engage in new trades not contemplated by their act, but it is said that they may embark in other undertakings, however various, provided the object of the directors be to increase the profit of their own railway. This is in truth the same proposition in another form; if the company cannot carry on a new trade, because it is not contemplated by the act, they cannot embark in other undertakings not sanctioned by the act, merely because they hope the speculation may ultimately benefit the stockholders."

In *Wood v. Greenville and Raleigh Plank Road Co.*, 3 Jones' Equity (North Carolina Reports), 183, when a company was chartered "to build a plank road from Greenville to Raleigh," the court at the suit of a stockholder restrained the company from using the funds of the company to buy stages and horses to establish a mail route over the road.

In *Coleman v. Eastern Counties Railway*, 6 English, Railroad cases, 573, it was held that the directors of a company have no right to pledge the funds of the company in support of any project not pointed out by their charter, although such project may tend to increase the traffic upon the railway though a majority of the stockholders may have consented and the object be not contrary to public policy.

In the case of *Solomons v. Lang*, 14th Jurist, for December, 1840, the company had power by its charter to "build and maintain" a railway. In a certain legal and legitimate way, under the charter, the company became possessed of certain shares in another railway. Subsequently, it undertook to purchase other shares in the same company. Lord Langdale, M. R., held that this was an unauthorized application of the funds of the company.

This court, in *Mayor, etc. v. Macon & Western Railroad*, 7 Ga. 221, held that it was not in the power of the Macon and Western Railroad, chartered to carry passengers, etc., from Macon to Atlanta, to undertake to transport produce through Macon, across the bridge, to the Central Railroad depot.

In *Merritt v. The Shrewsbury and Chester Railway*, the company undertook to improve the navigation of the river Dee, upon which, by their charter, they had wharves and warehouses, and upon which also came much of the freight carried upon the road, but the court held such an undertaking *ultra vires*. 3 Eng. L. & E. R., 149. In 16th English Law and Equity Reports, 180, it was held that a railroad company could not contract to pay the

expenses of a managing committee of a new railway company in application to Parliament for a charter. See also *E. A. R. R. Co. v. The Eastern Co. Railway Co.*, 21 L. Rep. (N. S.), and the court say they are a corporation only for the purpose of making and maintaining the East. C. Railway, and they cannot engage in a new trade. See, also, 10 Beavan, 1; 6 Railway Cases, 152; 43 N. H. 5115.

These cases all proceed upon the well established principle that a corporation has no powers except those expressly granted by its charter, and such as are necessary to the declared objects of the grant; that the charter is to be strictly construed, and that the capital stock, credit, and property of every kind are to be used solely for the purposes and objects of the charter. So long as a company confines itself within the "purposes and objects declared by the charter," the courts will sustain it, but when it undertakes new and distinct enterprises not declared in the charter, under a pretense that they are in furtherance of the declared design, the courts will restrain them. The power to do acts and make contracts necessary to enable a corporation to answer the ends of its creation, like the express grants of power, is also to be strictly construed, and is limited by all the cases and by the general principles of all the books, with this qualification, that even for this purpose it cannot engage in any new and distinct enterprise, involving new risks to its stockholders, and not fairly within the terms of the original grant. 18 How. 341, 485; 2 Russ. & My. 480, 470; 4 Railway Cases, 492; 7 Hare Chan. R. 114; 4 My. & Craig, 134; 1 Edwards, 84; 22 N. Y. 274; 13 Eng. Law and Equity, 513; 4 Russ. 562; 1 Black (U. S.), 449. The purchase of stock in another railroad company with intent to hold it, and especially, as is admitted by the answer in this case, with intent to use the power thus acquired to secure an interest in the management, either for good or evil, of the road, seems to come exactly within the principles which we have deduced from an unbroken series of decisions both in England and this country.

If the Central Railroad Co. may lawfully buy twelve thousand three hundred and eighty-three shares in this road, it may lawfully buy all the shares, become the owner of the road, and thus, without any grant from the State of Georgia, this company may have power to manage and maintain two railroads from Savannah to the interior of the State. Nay, the same principles precisely which would derive from its charter this power, would authorize it to become the owner of every railroad in the State, and of every other corporation and enterprise in the State, the management of which may in any way affect the interest of the Central Railroad Co. We do not think the stockholders of the

Central Railroad Co., by their subscription, bound themselves to any such indefinite and unlimited enterprise. They contracted to give to the majority of the stockholders a control over their funds, for the purpose of making and keeping up and using a railroad from Savannah to Macon, and the appropriations of the capital, or credit, or funds of the company in any other enterprise, against the consent of any of the stockholders, is a violation of the rights of those stockholders, and a court of equity will restrain the company from such an act.

6. Thus far we have considered this question solely in reference to the right of a stockholder to insist upon it that the company shall not violate his rights by compelling him, against his will, to become a partner in an enterprise not contemplated in the contract. But the stockholder has a right to insist upon it, that the funds of the company, in which he has an undivided interest, shall not be used in violation of the public policy of the State. He does not stand like a mere citizen on his rights as a citizen. He is one of the owners of the funds, property, and credit of the incorporation. Its corporate privileges belong to him; at least he has a legal and pecuniary interest in them, and he has a right to refuse to allow them to be used against public policy, and to protect them against the danger of forfeiture by their uses contrary to that policy. It is, therefore, a pertinent question in this case whether it is or is not contrary to public policy that the Central Railroad Co. shall be permitted to obtain such an interest in the Atlantic & Gulf Railroad as is contemplated by this purchase. All experience has shown that large accumulations of property, in hands likely to keep it intact for a long period, are dangerous to the public weal. Having perpetual succession, any kind of a corporation has peculiar facilities for such accumulation, and most governments have found it necessary to exercise great caution in their grants of corporate powers. Even religious corporations professing, and in the main, truly, nothing but the general good, have proven obnoxious to this objection, so that in England it was long ago found necessary to restrict them in their powers of acquiring real estate. Freed, as such bodies are, from the sure bound to the schemes of individuals—the grave—they are able to add field to field, and power to power, until they become entirely too strong for that society which is made up of those whose plans are limited by a single life.

Beacon
to have done

There is, too, in this country, a reason for strictly construing charters, and for confining corporations to their powers, that does not exist in any other. Under other forms of government, if a charter be found to have privileges which prove dangerous, it is in the power of the State to alter or repeal the charter. But get-

ting their grants, as most of our corporations do, from the State, they are held to be contracts, and it is not in the power of the State, under the Constitution of the United States, materially to interfere with the grant, however improvident or unwise it may prove to have been. For these reasons it has, in this country as well as in England, ever been considered the very highest public policy to keep a strict watch upon corporations, to confine them within their appointed bounds, and especially to guard against the accumulation of large interests under their control. Without doubt much of the prosperity of this country is due to the large number of corporations which have been created, and especially have we to be thankful for the good effected by railroad companies. But I am strongly impressed with the conviction, that much of their success in developing the resources of the country is due to the very jealousy which has ever held them strictly to their charters, and has constantly been careful to prevent an undue accumulation of interests under one management. The certainty that each stockholder has, that his funds will be applied to known and declared purposes, has made them favorite investments for prudent men, whilst the rivalry which opposing interests engender begets an energy, economy, skill and enterprise that have had much to do with the remarkable progress which such enterprises have made. A colossal enterprise, assured of handsome dividends by the possession of a monopoly, may well rest upon its position, knowing that however the country may suffer from its exactions, its own profits are secure. It is the rivalry of opposing interests, the struggle for success, nay, even for life, with dangerous opposition, that gives life, enterprise, and success to railroads as to other human undertaking. It has been the conflict with thirty State lines, each with its opposing interests, and with numerous seaboard cities, each seeking to attract the rich outpourings from the great interior that has begotten the mighty net-work of iron which interlaces our extensive territory, and I am convinced that there is no public policy more striking than that which, whilst it fosters every such undertaking, is yet careful ever to keep in view the danger of a monopoly, and the good effect of rivalry and conflict between different companies. The Central Railroad is, and has long been, the pride of Georgia. The skill, energy, and prudence with which its affairs have been managed reflect great credit upon the men who have had these affairs in their control, and the State may well be grateful for the success that has followed. Yet we cannot but think it would be a measure fraught with great public evil to give to that company permission to control and manage its great rival, the Atlantic & Gulf Road.

Already has the State empowered the Central Co. to control the Waynesborough, the Southwestern, and the Eatonton and Muscogee roads, making its whole line about six hundred miles in length. But all these are feeding roads of the line from Macon to Savannah, and there is no rivalry between them. The Atlantic & Gulf Railroad has also Savannah for its eastern terminus, whilst its western end strikes the Flint River at Bainbridge, and, connected thus with the Chattahoochee, it opens an active and effective competition with the Central and Southwestern railroads for the trade of our great cotton region. Indeed the admitted facts of this answer show that the very object of the contemplated purchase, the sole motive which prompts it, is to prevent the ruinous competition which the Gulf road has already entered into for the freights of the Flint and Chattahoochee regions.

Even a petty tradesman cannot legally bind another not to carry on a particular business over any large extent of territory; and here is a contract, the object of which is unblushingly avowed to be to so get control of the Atlantic & Gulf Railroad as that its present mode of carrying freights at low rates shall cease, and the very object of the legislature in granting the charter, and becoming itself a large stockholder, be thwarted.

As a matter of course, if the power to make this contract was granted in the charter, the public policy of such a grant would not be a matter for the consideration of the courts; but, as we are clear there is no such grant, we mention it as an additional reason why the rules for the strict construction of the charter should be adhered to, and the courts should be prompt to lend their aid to the complainants, who, as they are stockholders in these roads, have a right to insist upon it that funds and credit in which they have an interest shall not be used to the detriment of the public interests and in violation of the plain policy of the State. See cases quoted above, as to the rights of a corporation and the authority of even a single stockholder to interfere and restrain the company.

FIRST NATIONAL BANK OF CHARLOTTE v. NATIONAL EXCHANGE BANK OF BALTIMORE.

IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1875.

[Reported in 92 United States Reports 122.]

ERROR to the Court of Appeals of the State of Maryland.

The plaintiff, a national bank organized under the laws of the United States, and doing business at Charlotte, N. C., desiring to

increase its capital stock, and for that purpose to deposit with the Treasurer of the United States at Washington \$50,000 in bonds of the United States, employed Bayne & Co., of Baltimore, as its agent, to procure and deliver them at the treasury. Not having money to pay for them at the time, the plaintiff sent its president, Wilkes, to Baltimore, with a certificate previously prepared in Charlotte, as follows:

" FIRST NATIONAL BANK OF CHARLOTTE, N. C.,

" CHARLOTTE, Dec. 15, 1865.

" Received on deposit, from Bayne & Co., fifty-five thousand United States 5-20 bonds, third issue, payable to the order of themselves on return of this certificate.

" JOHN WILKES,

" Pres. First Nat. Bk., Charlotte, N. C."

This certificate was delivered by Wilkes to Bayne & Co. in Baltimore; and on the 18th of December, 1865, they, having endorsed the same, deposited it, together with other securities, with the National Exchange Bank of Baltimore as collateral security for a loan call of \$80,000 then made by that bank to said firm of Bayne & Co.

A few days after the delivery of said certificate the plaintiff deposited in New York to the credit of Bayne & Co. a sum sufficient to pay the same, and received in January, 1866, oral notice from them that the certificate was discharged and subject to its order. In March, 1866, the plaintiff received a written notice to the same effect, but did not apply for the surrender of said certificate. In April following Bayne & Co. failed, and the plaintiff was then notified by the defendant that it held the certificate of deposit for value, and demanded the delivery of the bonds therein mentioned.

Wilkes, the president, was sent by the plaintiff to Baltimore to negotiate for the return of said certificate. He informed the defendant that it had been satisfied by the payment to Bayne & Co., and disavowed any legal liability on account of same to the defendant. To avoid suit, however, Wilkes offered to pay \$5000 upon the delivery of the certificate, which defendant refused, but offered to take \$20,000, and threatened suit unless so settled. Wilkes declined to pay this sum, but asked for delay until he could return to Charlotte to consult the directors of his bank. He again returned to Baltimore, and new negotiations for compromise of the controversy between the two banks in regard to their respective rights to the certificate were opened. Wilkes ascertained that the defendant held, among its collaterals from Bayne & Co., a large number of shares of Washington, Alexandria & George-

town Railroad stocks, the market value of which had been seriously depressed by the failure of Bayne & Co. Having informed himself in regard to the condition of the stock and its supposed value, and after one or two interviews with the president and directors of the defendant, it was finally agreed that the plaintiff should take four hundred shares of the Washington, Alexandria & Georgetown Railroad stock and one thousand shares of the Maryland Anthracite stock, the same being valued at \$40,000; and one hundred and twenty-five shares of the stock of the plaintiff, valued at \$15,000—the latter, inasmuch as he was advised that a national bank could not buy its own stock, to be taken by Wilkes himself, thus making \$55,000. Upon the basis of this settlement the defendant was to deliver to Wilkes the certificate held by it for the \$55,000 United States bonds. The plaintiff paid to the defendant the sum of \$40,000, according to the terms of the above settlement, and received the certificates for one thousand shares coal stock. The four hundred shares of railroad stock were not then delivered, there being a suit about it at the time of the agreement which prevented all transfers; but it was regarded and treated by both parties as belonging to the plaintiff.

In September, 1869, nearly three years after the date of the settlement, suit was brought by the plaintiff in the Superior Court of Baltimore City to recover the \$40,000 paid by it to the defendant in pursuance of the arrangement above stated. At the request of the plaintiff the court granted the following propositions of law:

First. That if the plaintiff agreed to purchase for \$40,000 the railroad and coal stock, and paid that sum, then the court must find for the plaintiff for that amount; provided the court shall find that the defendant knew the plaintiff to be a national bank, and shall further find that the certificate of deposit was delivered up in consequence of said contract, if by said contract no part of the \$40,000 was to be paid for the certificate.

Second. That if the plaintiff agreed to purchase the said stock for \$40,000, and Wilkes also agreed to purchase for \$15,000 one hundred and twenty-five shares of plaintiff's stock, and the inducement to both agreements was Wilkes's desire to obtain the certificate of deposit, and he did so obtain it, that does not inure to make the first contract valid, provided the court shall find that by the first-mentioned contract the consideration for which the sum of \$40,000 was to be paid was the railroad and coal stock, and that no part of said sum was to be paid for the certificate of deposit.

Third. That if the plaintiff, in order to compromise the certificate of deposit, agreed to purchase it and the railroad and coal

stock for \$40,000, and paid the money, then the plaintiff is entitled to recover so much of said sum as the court shall find was paid for said stock.

The court found for the defendant, and rendered a judgment in its favor, which the Court of Appeals affirmed: whereupon the case was brought here by writ of error.

*J. Upshur Dennis and John Scott, Jr., for the plaintiff in error.
William F. Frick, contra.*

WAITE, Ch. J., delivered the opinion of the court.

The question presented for our consideration in this case is whether a national bank, organized under the National Banking Act, may, in a fair and *bona fide* compromise of a contested claim against it, growing out of a legitimate banking transaction, pay a larger sum than would have been exacted in satisfaction of the demand, so as to obtain by the arrangement a transfer of certain stocks in railroad and other corporations; it being honestly believed at the time that by turning the stocks into money under more favorable circumstances than then existed a loss which would otherwise accrue from the transaction might be averted or diminished. Such, according to the finding below, was the state of facts out of which this suit has arisen. That finding is conclusive upon us.

A national bank can "exercise by its board of directors, or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking, by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money on personal security; and by obtaining, issuing, and circulating notes." Rev. Stat., § 5136, par. 7; 15 Stat. 101, § 8.

Authority is thus given to transact such a banking business as is specified, and all incidental powers necessary to carry it on are granted. These powers are such as are required to meet all the legitimate demands of the authorized business, and to enable a bank to conduct its affairs, within the general scope of its charter, safely and prudently. This necessarily implies the right of a bank to incur liabilities in the regular course of its business, as well as to become the creditor of others. Its own obligations must be met, and debts due to it collected or secured. The power to adopt reasonable and appropriate measures for these purposes is an incident to the power to incur the liability or become the creditor. Obligations may be assumed that result unfortunately. Loans or discounts may be made that cannot be met at maturity. Compromises to avoid or reduce losses are oftentimes the necessary results of this condition of things. These compromises come within the

general scope of the powers committed to the board of directors and the officers and agents of the bank, and are submitted to their judgment and discretion, except to the extent that they are restrained by the charter or by-laws. Banks may do in this behalf whatever natural persons could do under like circumstances.

To some extent it has been thought expedient in the National Banking Act to limit this power. Thus, as to real estate, it is provided (Rev. Stat., § 5137; 13 Stat. 107, § 28) that it may be accepted in good faith as security for or in payment of debts previously contracted; but if accepted in payment, it must not be retained more than five years. So, while a bank is expressly prohibited (§ 5201; 13 Stat. 110, § 35) from loaning money upon or purchasing its own stock, special authority is given for the acceptance of its shares as security for and in payment of debts previously contracted in good faith; but all shares purchased under this power must be again sold or disposed of at private or public sale within six months from the time they are acquired.

Dealing in stocks is not expressly prohibited, but such a provision *is implied* from the failure to grant the power. In the honest exercise of the power to compromise a doubtful debt owing to a bank, it can hardly be doubted that stocks may be accepted in payment and satisfaction with a view to their subsequent sale or conversion into money, so as to make good or reduce an anticipated loss. Such a transaction would not amount to a dealing in stocks. It was, in effect, so decided in *Fleckner v. Bank U. S.*, 8 Wheat. 351, where it was held that a prohibition against trading and dealing was nothing more than a prohibition against engaging in the ordinary business of buying and selling for profit, and did not include purchases resulting from ordinary banking transactions. For this reason, among others, the acceptance of an endorsed note in payment of a debt due was decided not to be a "dealing" in notes. Of course, all such transactions must be compromises in good faith, and not mere cloaks or devices to cover unauthorized practices.

It is difficult to see how a debt due from or a contested obligation resting upon a bank occupies any different position in respect to this power of adjustment and compromise from that of a debt owing to it. The object in both cases is to get rid of or reduce an apprehended loss growing out of legitimate business; and it would seem that whatever might be done in the one case ought not to be excluded from the other under the same circumstances. Often a discharge by a bank of its own obligation creates a debt due to it from another. Such was the case here. Bayne, without authority, transferred to the defendant, as collateral security for his indebtedness, a certificate of deposit issued to him by the

plaintiff, and afterward collected the money due upon the certificate from the plaintiff without disclosing the transfer. Any payment by the plaintiff to the defendant, therefore, in discharge of its liability upon the certificate, became a lawful charge against Bayne. He was insolvent. It was on this account not only the right, but the duty, of the officers and agents of the plaintiff to protect by their arrangements, as far as possible, the stockholders whose interests they represented. This was necessarily left to their judgment and discretion. No question of good faith is involved. The transaction for all the purposes of this suit must be taken to have been, in fact, what it purports to be—a fair and honest compromise of an outstanding claim with a view to ultimate protection against an impending loss. As such, we think it was within the corporate powers of the bank, and that the Court of Appeals did not err in so holding.

Judgment affirmed.

WILLIAM L. ELKINS *v.* THE CAMDEN & ATLANTIC
RAILROAD CO.

IN THE COURT OF CHANCERY OF NEW JERSEY, OCTOBER TERM,
1882.

[Reported in 36 *New Jersey Equity Reports* 5.]

BILL for injunction. On motion to dissolve the injunction on bill and answer.

P. L. Voorhees and *B. Williamson* for the motion. J

D. J. Pancoast, *S. H. Grey*, and *T. N. McCarter* contra.

THE CHANCELLOR. The bill is filed by William L. Elkins, a stockholder of the Camden & Atlantic Railroad Co., on behalf of himself, and the other stockholders, against the company, to restrain it from entering into or executing any agreement with the Philadelphia & Atlantic City Railway Co., for the purchase by the former of the railroad of the latter company, and from entering into or executing any agreement with William Massey for the purchase by it of his interest in the latter company, for the purpose of getting control of the road of that company, and from entering into or executing any agreement with any corporation or corporations, persons or persons, for the purchase by it of any of the property or stock of the latter company for any purpose not necessary for the proper operation of its own road. The bill states that it is the purpose of the defendant and its board of directors, in its name and with its funds, either to purchase of

the Philadelphia & Atlantic City Railroad Co. its railroad (which runs, as does that of the defendant, from the city of Camden to Atlantic City), for a very large sum of money, or to purchase of William Massey, who, it alleges, is the owner of the greater part of the stock and property of that company, his interest therein, for the sum of \$500,000, over and above certain debts and liabilities of that company, estimated to amount to \$200,000, to be assumed and paid by the defendant as a part of the consideration of the purchase; that the terms of the agreement to make the purchase of Massey had already, when the bill was filed, been agreed upon between him and the president of the defendant, and that at a meeting of the board of directors of the defendant, held in Camden, on the 29th of May last, a resolution was passed in favor of the execution of the agreement to purchase from Massey his interest for the before-mentioned consideration. The bill further states that it is the design of the president and board of directors of the defendant to purchase, with the funds and in the name of the defendant, either the entire property of the Philadelphia & Atlantic City Railway Co., or a controlling interest therein, with a view of uniting the property, business and management of that company with those of the defendant; and it charges that the scheme is foreign to the object and purposes of the defendant, beyond its powers, unlawful in its character and against the best interests of its stockholders, and that, if executed, it will result in irreparable injury to the complainant and the other stockholders of the defendant. On the filing of the bill an injunction was issued pursuant to the prayer thereof. The defendant has answered, and now, on the bill and answer, moves to dissolve the injunction. The answer, while it denies that the agreement referred to in the bill is as therein stated, admits that an agreement has been made between the president of the defendant, on its behalf, and Massey, for the sale by the latter to the defendant, for the consideration of \$500,000, to be paid in the defendant's first mortgage bonds, of his stock, bonds, and other claims of and against the Philadelphia & Atlantic City Railway Co., and certain rolling stock of his.

The agreement, according to the answer, was by its terms to be of no effect, unless first submitted to and approved by the defendant's board of directors, and then ratified by its stockholders. There was also a provision for the purchase of the property by the defendant's president, for himself, or such of the defendant's stockholders as might associate themselves with him or them, in case of the directors or stockholders neglecting or refusing to approve of the agreement. That, however, is of no importance in the decision of the question under consideration. The agreement was made on the 26th of May last, and was to be carried out on

the first of July following. The answer avers that so far from being an injury to the complainant and the other stockholders of the defendant, the execution of the agreement would be greatly to their advantage, and it avers also that it would be greatly to their advantage if by purchase, lease, uniting, or consolidating with the Philadelphia & Atlantic City Railway Co., the defendant could have the management and operation of the railway of that company, and use and operate it as a branch or lateral road. The latter road is a rival road. It is a narrow-gauge road, while the defendant's is of the ordinary gauge. The Philadelphia & Atlantic City Railway Co. is insolvent, proceedings for foreclosure and sale of its road under the mortgage (for \$500,000) thereon being now in progress in this court, and the road is now, by leave of this court, in the hands of, and operated by, the trustees for the bondholders under that mortgage. It appears, by the answer, that the defendant's board of directors have approved of the agreement in question, and that they do not intend to take any steps to carry it out, unless it be ratified by the stockholders. But though the answer avers that it is not the intention of the president and directors to act in the matter without the full consent, approval and direction of the stockholders, it must be understood that it does not mean to say that they will not act without the consent of all the stockholders, for otherwise the filing of the bill by the complainant, a dissentient stockholder, would have put an end to the matter, at least until his consent should have been obtained. What it means, undoubtedly, is that they will not act without the consent of the holders of a majority of the stock.

It is quite clear that unless the purchase in question can be sustained as a union or consolidation of the defendant with the other company, it cannot be sustained at all. On its face it is merely the purchase by the defendant, as a speculation, of stock and bonds, and floating debt of an insolvent corporation, together with rolling stock which it cannot use on its own road. In that view it is so obviously foreign to the objects for which the defendant was incorporated, so utterly unauthorized by any law, and so clearly beyond its powers, that no attempt is made in the answer, nor was any made on the argument, to sustain it on that ground; but the effort was made to sustain it on the ground that it is, in effect and in fact, a union and consolidation with the rival company, or an acquisition of the road of that company, as a lateral road. And inasmuch as on its face the agreement is neither of those things, it was urged that the court should, if it appears that the proposed purchase is designed merely as means for such union and consolidation or acquisition, have regard to the object and purpose rather than to the means by which they are both effected. By the

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general railroad law (Rev. 930, § 17) and the act of 1880 (P. L. of 1880, 231), power is given to railroad companies to lease their roads, or any part of them, to any other corporation or corporations of this or any other State, or to unite and consolidate as well as merge their stock, property and franchises and roads with those of any other company or companies of this or any other State, or to do both; and it is provided that after such lease or consolidation the company acquiring the other's road may use and operate such road, and its own roads, or any of them. The purchase in question here has no reference to the acquisition of the narrow-gauge road by lease. But it is, as before stated, claimed that it is designed to enable the defendant to acquire the control and use of that road. That design is not directly avowed in the answer. It is charged in the bill, however, and is not denied in the answer, and it is a fair inference from the latter, that such and no other is the design. The object is to obtain ownership of so great a part of the stock, indebtedness and property of the narrow-gauge company as to enable the defendant by means thereof to become the purchaser of its property at the foreclosure sale, or to have control of it after such sale in any reorganization of the company. ~~But the acts of the legislature before referred to, while they give the defendant power to unite and consolidate with the other company, give it no power to purchase the debts of that company or its road, and it has no power to borrow money for either of those purposes. Union and consolidation of two railroad companies are one thing, and the purchase by one company of the property and franchises of the other is another. What the defendant proposes to do is, not to unite and consolidate with the other company, but to purchase the means of controlling the property and franchises of that company, and for that purpose to borrow half a million dollars on mortgage of its own property and franchises. It has no power to borrow money for that purpose, and if it had the money in its treasury it would have no right to use it for that purpose. The purchase of a rival railroad is (not to speak of public policy) foreign to the objects for which the defendant was incorporated. Nor can the purchase be regarded as within the authority given by the defendant's charter to build lateral or branch roads.~~ The charter authorizes the company to construct a railroad (the main line) from the city of Camden, or some point in the county of Camden within a mile of the city, to run to the sea at or near Absecon Inlet in Atlantic County, and two branches from some convenient point in the main road, to be determined by the company, one to run to Batsto village in Burlington County, and the other to May's Landing in Atlantic County. P. L. of 1852, 265. The narrow-gauge road runs, as before

stated, from Camden to Atlantic City. Obviously, the acquisition of it cannot be regarded as authorized by a grant of power to build branches from the defendant's main line to Batsto and May's Landing. The transaction under consideration must be regarded as an agreement to buy stock and bonds, and unsecured debt of an insolvent corporation. As such, irrespective of the assumed ulterior object in the purchase, it is not even suggested that it is legitimate. It does not appear that the rolling stock included in the bargain, and valued therein at \$109,000, is to be purchased for use on the defendant's road, but it is reasonable to conclude that it is not, seeing that it is adapted to the narrow-gauge road, and therefore not to the defendant's. Moreover, it is apparent that the agreement is to be regarded as a whole, and is so regarded by the defendant. As a purchase with a view to extinguishing competition the transaction is clearly *ultra vires*. *Colles v. Trow City Directory Co.*, 11 Hun, 397.

It is urged that to induce this court to interfere by injunction in such a case as this, it must appear that the complainant will, if it withholds its prohibition, sustain irreparable injury, and it is insisted that so far from being an injury to the stockholders the proposed purchase will be of very great advantage. It is also urged that the complainant is a mere volunteer; that he acquired his stock after the negotiations for the purchase in question were begun, and got it for the very purpose of defeating the project. To dispose of the latter objection: It appears that the complainant is a stockholder. If, in fact, he acquired his stock at the time and with the design alleged in the answer, that would not affect his right to the relief which he seeks. But those things appear only from the averments of the answer, and those averments are not responsive and are therefore no evidence, and if they were they are not verified. As to the former objection: The proceeding in question is, as before stated, strictly *ultra vires*. In such a case equity will give such appropriate relief as may be practicable against the illegal act, and that, too, at the suit of a single stockholder, while on the other hand it will not interfere in a matter involving no breach of trust but only error of judgment on the part of the representatives of the company, even though such error may eventuate in the injury of the stockholders. In the case in hand, the illegal agreement has been made, in behalf of the company, by its president, subject to the approval of the directors and stockholders. The directors have already approved of it. It is true they have provided by resolution for the calling of a special meeting of the stockholders to pass upon it; but the voice of such a meeting could not authorize the project if it be beyond the powers of the corporation. It is enough to warrant

the interference of this court to know that it is the admitted intention of the board to execute the illegal agreement, provided the holders of a majority of the stock are favorable to it. The motion to dissolve is denied, with costs.¹

NAT KENNEDY, RESPONDENT, *v.* THE CALIFORNIA SAVINGS BANK *et al.*, DEFENDANTS. THE CALIFORNIA NATIONAL BANK, APPELLANT.

IN THE SUPREME COURT OF CALIFORNIA, MARCH 1, 1894.

[*Reported in 101 California Reports 495.*]

APPEAL from a judgment of the Superior Court of San Diego County, and from an order denying a new trial.

The facts are stated in the opinion of the court.

James E. Wadham for appellant.

William H. Fuller and *Works & Works* for respondent.

HARRISON, J. During the year 1891 the plaintiff deposited with the California Savings Bank, one of the defendants herein, different sums of money, for which the said defendant issued to him its several certificates of deposit, amounting in the aggregate to \$45,000. On the 12th of November, 1891, the plaintiff demanded of the savings bank payment of the amount of said certificates, and, upon its refusal, brought this action, making the other defendants parties to the action, for the purpose of recovering from them their proportion of said indebtedness as stockholders in the California Savings Bank. Judgment was recovered against the savings bank for the full amount of the claim, and against the other defendants for their respective proportions thereof as such stockholders. The California National Bank, one of the defendants, has appealed upon the ground that by virtue of the statutes under which it is organized it had no power to become a stockholder in another corporation, and that its act in becoming such stockholder is so far *ultra vires* that it cannot be made liable for any portion of the indebtedness of the corporation. The California Savings Bank was organized January 13, 1890. September 10, 1890, nine hundred and ninety shares of its capital stock was issued to J. W. Collins, cashier of the California National Bank, and on January 2, 1891, the certificates representing these shares were cancelled, and one certificate therefor was issued to the California National Bank, and was thereafter held by it until

¹ A portion of the opinion has been omitted.—ED.

after the commencement of this action. During this period two dividends upon the stock were paid by the savings bank to the appellant.

The defense of *ultra vires* is looked upon by courts with disfavor whenever it is presented for the purpose of avoiding an obligation which a corporation has assumed merely in excess of the powers conferred upon it, and not in violation of some express prohibition of the statute. Courts are inclined to treat the corporation as estopped from setting up this defense in all cases where it has received and retains the benefit of the transaction, and seeks by this plea to avoid its correlative obligation.

In *Evans v. Bailey*, 66 Cal. 112, an action was brought against the stockholders of the California Fruit & Meat Shipping Co. to recover from them their respective proportions of certain indebtedness to the plaintiff of that corporation. One of these defendants was the People's Ice Co., another corporation which held a thousand shares of the capital stock of the corporation debtor, and to its objection that it was *ultra vires* for it to hold stock in another corporation, it was held that as it did not appear that it was not within the scope of its power to hold stock in the defendant corporation under any circumstances, or for any purpose, and as the circumstances under which it had acquired the stock were not shown, the defense could not be maintained.

There is no provision in the statute by which a national bank is expressly prohibited from becoming a stockholder in another corporation, and, while it may be conceded that its subscription to the shares of another corporation would be so far in excess of the powers conferred by the statute under which it is organized that the executory contract therefor would not be enforced, it by no means follows that, if such contract is executed, and it has been registered as such stockholder, it is not entitled to a voice in its corporate management, or to its share of the corporate earnings while the corporation is in existence, or of its assets upon a dissolution thereof. It may take shares in another corporation as collateral security for a loan made by it, and, if the loan is not paid, it may become the owner of those shares, and have them registered in its name upon the books of that corporation; and in such a case it is subject to the same liabilities as any other stockholder. In *National Bank v. Case*, 99 U. S. 628, the bank had become a stockholder in another corporation under such circumstances, and it was held to be liable for its proportion of the debts of the corporation in which it had been a stockholder, although it had transferred the stock to one of its clerks for the purpose of avoiding such liability.

As the appellant herein could have taken the stock of the sav-

ings bank in satisfaction of a loan for which it had been pledged to it as security, it was within the scope of its power to become a stockholder therein, so that it cannot be said that it was prohibited by statute from becoming such stockholder. Having caused itself to be registered upon the books of the corporation as a stockholder, any person dealing with the corporation would be justified in assuming that it had become such stockholder by virtue of a transaction within its power, rather than in violation of the laws of its creation, and, so long as it held itself out as such, it ought not to be permitted to defend against its liability as such stockholder by showing that it had become such in violation of law. "Strangers are presumed to know the law of the land, and they are bound when dealing with corporations to know the powers conferred by their charter. These are open to their inspection, and it is easy to determine whether the act is within the scope of the general powers conferred for that purpose, but they have no access to the private papers of the corporation, or to the motives which govern directors and stockholders, and no means of knowing the purposes for which an act that may be lawful for some purposes is done. The very fact that the appointed officers of the corporation assume to do an act in the apparent performance of their duties, which they are authorized to perform for the lawful purposes of the corporation, is a representation to those dealing with them that the act performed is for a proper purpose, and such is the presumption of the law, and upon this presumption strangers, having no notice in fact of the unlawful purpose, are entitled to rely." *Miners' Ditch Co. v. Zellerbach*, 37 Cal. 587; 99 Am. Dec. 30.

The appellant has not repudiated the agreement under which it received the stock, but still retains it, and, so far as is shown by the record, claims to be the owner of it, and to share in all the earnings and assets of the corporation. During the period that it has claimed to be such owner it has received dividends out of the assets of the savings bank, and to that extent diminished the corporate property which otherwise might have been appropriated in satisfaction of the plaintiff's claim. See *Mitchell v. Beckman*, 64 Cal. 117. Having had the benefit of the transaction, and still enjoying its fruits, it is estopped from denying a liability which is correlative to such benefit and fruits, and dependent thereon. See *Morse on Banking*, sec. 735.

The judgment and order are affirmed.

GAROUTTE and PATERSON, JJ., concurring.

Hearing in banc denied.

The Petitioner, a private corporation, sold all its property to the Debt. Co. and took stock in said company. The Debt. Co. then ceased to operate. Four years after, the Petitioner sold back

730 HOLMES & GRIGGS M'FG CO. v. H. & W. M. CO. [CHAP. III.]

1440 shares to the Debt. Co. & THE HOLMES & GRIGGS MANUFACTURING CO., RESPONDENT, v. THE HOLMES & WESSELL METAL CO. et al., APPELLANTS.

IN THE COURT OF APPEALS OF NEW YORK, JUNE 2, 1891.

[Reported in 127 New York Reports 252.]

APPEAL from judgment of the General Term of the Supreme Court in the First Judicial Department, entered upon an order made May 24, 1889, which affirmed a judgment in favor of plaintiff entered upon the report of a referee.

The nature of the action and the facts, so far as material, are stated in the opinion.

Adam C. Ellis for appellants.

Sidney S. Harris for respondent.

HAIGHT, J. This action was brought to recover the amount of a promissory note bearing date December 1, 1884, executed by the defendant, The Holmes & Wessell Metal Co., and indorsed by the defendants Morse and Shonnard. The defenses were *ultra vires*, no consideration, and a non-tender of certain stock for the purchase-price of which the note was given. The plaintiff is a manufacturing corporation organized under the general act of 1848 for the purpose of manufacturing sheet and rolled brass wire, tubing, and other articles composed wholly or in part of metal, in the city of New York. Its president was Charles E. L. Holmes, and its secretary and treasurer was George C. Edwards. On the 12th day of July, 1881, Holmes and Edwards entered into an agreement with the defendants Shonnard, Morse, and one Charles Wessell to organize a new company for the manufacture of brass, nickeline alloys, and other composite metals, under the corporate name of the Holmes & Wessell Metal Co. The capital stock of such company to be \$100,000, the whole amount to be issued and paid up in cash; three-fourths thereof to be subscribed and paid by Holmes and Edwards, and the remaining one-fourth by the other parties to the agreement. The agreement, in its preamble, recites that Holmes and Edwards propose to transfer the rolling mill belonging to the plaintiff, including all of the machinery, tools, and appliances connected therewith, together with the lease of the premises occupied by the plaintiff, for the sum of \$50,000. Subsequently and at an annual meeting of the plaintiff's stockholders held on the 20th day of July, 1881, the president and secretary were instructed to sell to the Holmes & Wessell Metal Co. the entire machinery and plant owned by the plaintiff, for the sum of \$50,000; and also authorized them to sell to the same company all

which would result in great injustice. The stock owned by the plaintiff was sold for the sum of \$50,000.

the material manufactured, unmanufactured, and in process of manufacture owned by the plaintiff, and to also subscribe for 3000 shares of the capital stock of the company, and to pay for the same out of the proceeds of the sale of the mill and materials.

It further appears that the Holmes & Wessell Metal Co. was incorporated on the 15th day of July, 1881, and that Charles E. L. Holmes subscribed for two thousand shares and George C. Edwards one thousand shares of the capital stock. Thereafter and on the 23d day of July 1881, the new company, at a meeting of its stockholders, authorized the purchase from the plaintiff of its plant and machinery, and to pay therefor the sum of \$50,000, and for the entire stock of materials manufactured and unmanufactured owned by the plaintiff the sum of \$31,333.96; and, on the 1st day of September thereafter, such sale was completed by the transfer of the plaintiff company to the defendant company of its entire plant, machinery, etc., and, in payment therefor, the defendant company issued to George C. Edwards, trustee, the stock subscribed for by Holmes and Edwards, amounting to \$75,000, and the balance, \$6333.96, was paid in cash. After such transfer the plaintiff discontinued its business.

On the 1st day of December, 1884, the plaintiff entered into a contract with the defendants, Morse, Shonnard, and said Charles Wessell, in which the plaintiff agreed to sell to the other parties thereto 1440 shares of the stock of the defendant company, standing in the name of Edwards, as trustee, for the sum of \$30,000, payable \$5000 in cash and the balance by certain promissory notes, of which the note in suit is one. The agreement further provided that the stock should remain in the name of Edwards, or some other officer of the plaintiff, as trustee; that it might be voted upon by him until delivered as specifically provided in the contract.

It is doubtless true that a corporation cannot purchase or deal in stocks of other corporations unless expressly authorized by law so to do. *Talmage v. Pell*, 7 N. Y. 328; *Berry v. Yates*, 24 Barb. 200; *Milbank v. N. Y., L. E. & W. R. R. Co.*, 64 How. Pr. 20; *Mechanics' Mut. Savings Bank v. Meriden Agency Co.*, 24 Conn. 156; *Central R. R. Co. v. Pennsylvania R. R. Co.*, 31 N. J. Eq. 475; *Hazlehurst v. Savannah R. R. Co.*, 43 Ga. 57; *Valley R. R. Co. v. Lake Erie Iron Co.*, 18 Northeastern Rep. 486; *People ex rel. v. Chicago Gas Trust Co.*, 130 Ill. 268-284; *Franklin Co. v. Lewiston Institution for Savings*, 68 Me. 43; *Hill v. Nisbet*, 100 Ind. 341-349.

It is equally true, however, that it may do whatever may be necessary in the exercise of its corporate franchises. The selling of property and collection of debts is among the powers given; and

hence, it may take title to all kinds of property, even the stock of another company, in the payment of a debt. *Talmage v. Pell*, *supra*, and cases above cited.

The statute under which the plaintiff was incorporated provides that "it shall not be lawful for such company to use any of their funds in the purchase of any stock in any other corporation." Laws 1848, c. 40, § 8. The funds here spoken of evidently mean the money of the company, and the statute was not intended to limit the powers of the corporation beyond that already indicated.

The plaintiff was a private manufacturing corporation. It exercises no powers of public nature, and has attempted no combination by which the public may in any manner be prejudiced. There are, consequently, no questions affecting public policy to be considered. The purpose of the company is expressed in a preamble to the resolutions adopted authorizing the sale of its plant and stock of materials on hand to the defendant company. It was, in short, to increase the business of the stockholders by adding to the manufacture of brass that of German silver and nickel alloys. The scheme adopted was the organization of a new corporation, bringing in some other persons with additional capital. The stock in the new company was subscribed for by Holmes and Edwards individually, and the stock, when finally issued, was issued to Edwards. It is true, he takes it as trustee and holds it as such for the plaintiff, but this we do not regard as necessarily *ultra vires*. The plaintiff had the right, with the consent of its stockholders, to sell its plant and retire from business; and it appears from the evidence in this case that the consent of all the stockholders was given to the sale that was made.

In *Kent v. Quicksilver Mining Co.*, 78 N. Y. 159-186, Folger, J., in delivering the opinion of the court says that "A corporation may not do acts which affect the public to its harm, inasmuch as they are *per se* illegal, or are *malum prohibitum*. Then no assent of stockholders can validate them. It may do acts not thus illegal, though there is want of power to do them, which affect only the interests of the stockholders. They may be made good by the assent of the stockholders, so that strangers to the stockholders, dealing in good faith with the corporation, will be protected in a reliance upon those acts."

In the case of *Treadwell v. Salisbury Mfg. Co.*, 7 Gray, 393-405, it was held that the directors of a manufacturing corporation may sell the whole property of the corporation to a new corporation, taking payment in shares of stock of the new company, to be distributed among the stockholders of the old company. In *Howe v. Boston Carpet Co.*, 16 Gray, 493, it was held that one manufacturing corporation may take the shares of another in payment of

a debt. Chapman, J., in delivering the opinion of the court, in commenting upon the case of *Treadwell v. Salisbury Mfg. Co.*, *supra*, says that "while corporations *quasi* public may be restrained and directed in the management of their affairs, yet corporations established for trading and manufacturing purposes may wind up their affairs whenever they think proper to do so, and in the manner adopted in that case. The legality of the transaction could not have depended on the intention of the corporation to wind up its affairs immediately. If it had taken the stock in the payment for goods, or for the sale of a building or land, or water power, which it did not want or desire to sell, while it still carried on its business, the act must have been equally legal."

In *Hodges v. New England Screw Co.*, 1 R. I. 312-347, the facts were, in many respects, similar to those under consideration. Greene, Ch. J., says: "Nor have we any doubt that the screw company might have rightfully taken this stock in the iron company in payment for their rolling-mill, if it had been taken with a view to sell it again, and not permanently hold it. Again, it is to be observed the directors were not investing the funds of the screw company in the stock of the iron company. They had on hand an unsalable rolling-mill, and they owed a heavy debt for it, and one great object in taking the stock in the iron company was to realize for the rolling-mill, and in parts pay thereby the debt." *State of Kansas v. Western Irrigating Canal Co.*, 40 Kas. 96; *Leathers v. Janney*, 41 La. 1120; *Hibernia Insurance Co. v. St. Louis & New Orleans Transp. Co.*, 8 Federal Rep. 516; *Taylor v. North Star Gold Mining Co.*, 79 Cal. 285; *Miners' Ditch Co. v. Zellerbach*, 37 *id.* 543; *State v. Butler*, 86 Tenn. 614; *Morawetz on Private Corporations*, § 212.

The plaintiff has sold its rolling-mill, machinery, etc., to the defendant. It has taken stock in the latter company in payment therefor. Inasmuch as this was done with the consent of all of the stockholders, it being the act of a private corporation, not in any manner harming the public, we see no reason for condemning its title to the stock so obtained. *Palmer v. Cypress Hill Cemetery*, 122 N. Y. 429-435.

But, assuming the transaction to have been *ultra vires*, the defenses interposed would still be unavailable. The plaintiff has the stock and has paid for it. It cannot be recovered back by the defendant, for the transaction is completed and closed. Whilst the contract remained executory, if it was unauthorized a stockholder or person interested might have interfered by injunction, and prevented the transfer of the property of the plaintiff to the defendant. But the contract having become executed, the title of the stock now vests in the plaintiff, and it has the power to sell

and dispose of the same. *Sistare v. Best*, 88 N. Y. 527-543; *Millbank v. N. Y., L. E. & W. R. R. Co.*, *supra*.

The contract under which the note in suit was given was made in December, 1884, nearly four years after the plaintiff became the owner of the stock. No claim is made that that contract is for any reason illegal or void. Numerous cases are found in which the courts have refused to execute contracts that were *ultra vires*, but this action is not based upon such a contract. The courts will not permit the plea of *ultra vires* to prevail whether interposed for or against a corporation, where it would not advance justice, but would accomplish a legal wrong. *Rider Life Raft Co. v. Roach*, 97 N. Y. 378-381; *Whitney Arms Co. v. Barlow*, 63 *id.* 62.)))

To hold that the plaintiff could not dispose of the stock would deprive it of the consideration received for the transfer of its rolling-mill and material, thus accomplishing a wrong and not advancing justice.

Our conclusions are that it had title to the stock and that, consequently, there was a valuable consideration for the note in suit.

The question raised in reference to the non-tender of the stock was properly disposed of by the General Term.

The judgment should be affirmed, with costs.

All concur.

Judgment affirmed.

The Citizens S. B. Co.
purchased shares
its president
79 shares in the

bank. Nat. Bk.
and bank in error
many years. Truly
the bank's bank

failed to elect
citizens bank
is being
used as a
stockholder
ultra vires

Dec 1st
citizens Bk

would have had the right to have taken its
share in payment to a debt, having the
right to take in certain cases & having abused
that right it is liable as a stockholder.
The contract was also executed.

CITIZENS' STATE BANK OF NOBLESVILLE v. HAWKINS.

IN THE CIRCUIT COURT OF APPEALS OF THE UNITED STATES,
SEVENTH CIRCUIT, JANUARY 6, 1896.

[Reported in 71 Federal Reporter 369.]

In error to the Circuit Court of the United States for the Dis-
trict of Indiana.

The defendant in error, Edward Hawkins, as receiver of the Indianapolis National Bank, brought suit against the plaintiff in error, the Citizens' State Bank, alleging his appointment by the Comptroller of the Currency of the United States as receiver of the national bank; that the assets of the bank were insufficient to pay its indebtedness, and that on the 25th of October, 1893, the Comptroller of the Currency, in order to pay the liabilities of the insolvent banking association, made an assessment upon all of the shares of its capital stock of 100 per cent. upon the par value thereof, and ordered payment thereof on or before the 25th day of November, 1893; that the Citizens' State Bank, at the time of the

suspension of the national bank, was, and since has been, the owner of seventy-nine shares of its capital stock, of the par value of \$100 each, and, notwithstanding notice of the assessment and demand of payment, made default, and recovery is sought for the sum of \$7900, the amount of such assessment.

The Citizens' Bank appeared to the suit, and made answer, *inter alia*, as follows: "The defendant, a banking corporation organized and existing under the laws of the State of Indiana as a State bank, answering, says: It is not liable herein, for that it did not become the owner or holder of the shares of stock in the Indianapolis National Bank, described in the declaration, either as a pledge or upon execution or any compromise or settlement of a doubtful or bad debt, but, on the other hand, in the manner following, and not otherwise; that is to say: Theodore P. Haughey, being the president of the Indianapolis National Bank, and at the same time president of this defendant, purchased the said shares for this defendant, and as its president, on the 31st day of July, 1885, of William Wallace, receiver, who was then the owner and holder thereof; and he, the said Haughey, having so purchased the same, as the president of and for this defendant, did then and there, as the president of the Indianapolis National Bank, cause the said shares to be transferred to this defendant on the books of the Indianapolis National Bank, in whose name the same have ever since stood. And this defendant says it is not liable herein, for that, under the act of Congress governing national banks, the said Haughey, as president of the Indianapolis National Bank, had no power or authority to transfer the same to this defendant, being an artificial person, to wit, a corporation of the State of Indiana. And this defendant had no power or capacity to receive the same, and to become or continue the holder or owner thereof, because by the laws of the State of Indiana authorizing the creation of State banks, and the manner of carrying on their business, this defendant was not authorized by law to become the holder or owner of shares in the Indianapolis National Bank, and so was prohibited from so doing. And defendant says that he, the said Theodore P. Haughey, from the date of said purchase until the failure of the Indianapolis National Bank, was at all times the president thereof, and so also of the defendant." To this part of the answer a demurrer was interposed, which demurrer was sustained by the court. On the 13th of December, 1894, the Citizens' Bank withdrew its general denial to the declaration, and declined to answer further, but elected to abide by the ruling of the court on the demurrer to the paragraph of the answer referred to; whereupon the cause was submitted to the court, and a judgment rendered against the State bank for the amount claimed.

The statute of Indiana (Rev. St. 1881, § 2687; Rev. St. 1894, § 2924) determining the powers of banking corporations, provides that they "may exercise, under this act, all the powers incidental and proper, or which may be necessary and usual in carrying on the business of banking as a bank of discount and deposit; may receive deposits, buy and sell exchange, gold and silver coin and bullion; and may loan money, negotiate, sell and guarantee such loans, and promissory notes, bonds, drafts, bills of exchange, and other evidences of debt, and any security thereof; and may become and act as the trustee for the same as fully as private persons may; but no such association shall issue notes, bills, or other evidences of indebtedness in the form or similitude of bank notes, and intended to circulate as bank notes or bills or as money. And such association may contract for, charge, take, reserve, and receive on loans and discounts for, charge, take, reserve and receive on loans and discounts the highest rates of interest allowed by the law of this State to be contracted for, taken and received by individuals."

Addison C. Harris and Geo. Shirts for plaintiff in error.

Frank B. Burke and John W. Kern for defendant in error.

Before WOODS, JENKINS, and SHOWALTER, C. JJ.

JENKINS, C. J., after stating the facts as above, delivered the opinion of the court.

An act is *ultra vires* a corporation when it is beyond and outside of the scope of the powers conferred by its founders—when the corporation is without authority to perform it under any circumstances or for any purpose. Such acts are wholly void, and no contract for their performance can be enforced by or against the corporation, the plea of *ultra vires* being available to either party to the contract. Such was the character of the agreement under consideration in *Thomas v. Railroad Co.*, 101 U. S. 71; *Central Transp. Co. v. Pullman's Palace Car Co.*, 139 U. S. 24, 11 Sup. Ct. 478. There are, however, acts done in excess of conferred powers, illegal as to shareholders, but for which the corporation is liable to innocent parties; as, for example, where a corporation is authorized to perform an act for a specific purpose, and performs the act for another and unauthorized purpose. In such case the plea of *ultra vires* is available to neither party. Such was the character of the contracts under consideration in *Union Gold Min. Co. v. National Bank*, 96 U. S. 640; *Smith v. Sheeley*, 12 Wall. 358; *Bank v. Matthews*, 98 U. S. 621; *Bank v. Whitney*, 103 U. S. 99; *Bank v. Stewart*, 107 U. S. 676, 2 Sup. Ct. 778; *Fritts v. Palmer*, 132 U. S. 282, 10 Sup. Ct. 93; *Bank v. Townsend*, 139 U. S. 67, 11 Sup. Ct. 496; *Thompson v. Bank*, 146 U. S. 240, 13 Sup. Ct. 66; *Bank v. Butler*, 157 Mass. 548, 32 N. E. 909;

Ditch Co. v. Zellerbach, 37 Cal. 543. In the case in hand no power is granted to purchase stock in another bank, and therefore a prohibition to do so may be implied. First Nat. Bank v. National Exch. Bank, 92 U. S. 122. It is not doubted, however, that under the banking law of Indiana the plaintiff in error had power to accept stock in another bank as security for a loan, or to acquire such stock by levy thereon and sale thereof under execution to satisfy a debt due to it. Morse, Banks, § 59; Bank v. Case, 99 U. S. 628. It had the power, therefore, under certain circumstances, and for certain purposes, to acquire stock in a national bank. It obtained the stock in question by purchase from a third party, and procured its transfer to itself upon the books of the national bank. The acquisition of such stock was within the general scope of its powers. The case is, therefore, one of an abuse of general power, a wrongful exercise of conferred power, for purposes and under circumstances contrary to law, and not the case of the exercise of a power not in any event given. It is, therefore, related to the second class above noted, to which the doctrine of *ultra vires* does not apply. In all such cases a corporation cannot "set up its own violation of law to escape the responsibility resulting from its illegal action." *Id.* 628-633. The misuse of power in such cases is matter for consideration by the authorities of the State. If such abuse of power be prejudicial to the public a forfeiture of the charter will furnish a preventive remedy. It would be a grievous wrong to permit a corporation to assert its own abuse of power to escape liability under the facts here disclosed. It held this stock for many years, taking any profits accruing therefrom. It must meet the liability resulting from the failure of the bank. It cannot approbate and reprobate. It has received the benefits. It must bear the burdens. "The doctrine of *ultra vires*, when invoked for or against a corporation, should not be allowed to prevail when it would defeat the ends of justice or work a legal wrong." Railroad Co. v. McCarthy, 96 U. S. 258-267. The judgment will be affirmed.

The Calif. nat. Bk. acquired 990 shares of the Calif. Sav. Bk. The cashier of the Calif. nat. Bk. made the transfer acting as cashier. The stock was placed in the name of the Calif. nat. Bank &

CALIFORNIA BANK v. KENNEDY.

IN THE SUPREME COURT OF THE UNITED STATES, MAY 24, 1897.

[Reported in 167 United States Reports 362.]

THIS action was commenced in the Superior Court of the county of San Diego, State of California, against the California Savings Bank, and other defendants, including the plaintiff in error. In each of five counts of an amended petition a separate

dividend was given the Calif. nat. Bk. ordinary mil banks failed & this suit was brought against the Calif. nat. Bk. as a stockholder. The then

of which cause of action was stated, seeking a judgment against the savings bank for the amount of a particular deposit of money alleged to have been made with it on a specified date, and a recovery was asked against the other defendants upon the ground that they were stockholders in the savings bank on the dates of the various deposits, and in consequence liable under the laws of California to pay the debts of the savings bank in proportion to the amount of stock held and owned by each stockholder. A demurrer to the amended complaint was overruled, and the California National Bank answered, denying that it was ever the owner of any stock in the savings bank, and alleging that if any such stock was ever issued to it, it was issued without due authority from the bank in its corporate capacity and without authority of law. The answer also averred that the bank never acquired "in the usual course of business or now has as owner any stock of the said defendant, the California Savings Bank."

No issue was taken upon the truth of the averments in the amended complaint as to the amount and date of the respective deposits which plaintiff alleged he had made in the savings bank.

From the evidence it appeared that the savings bank began business in January, 1890. Its stock consisted of twenty-five hundred shares, and was originally distributed in five certificates, each for 500 shares, one certificate being made in the name of each of the following persons: J. W. Collins, S. G. Havermale, D. D. Dare, William Collier, and H. F. Norcross. Norcross had no official connection with the national bank, but Collier, Dare, and Collins were, respectively, president, vice-president, and cashier of the national bank, and were also, with Havermale, directors of the bank during the period when the alleged transfers of stock were made to the bank.

The certificates in the names of Collier and Norcross were never delivered, and when subsequently cancelled contained no indorsement. In the stead of those certificates, however, on September 10, 1890, three certificates, aggregating 990 shares, were issued in the name of J. W. Collins, cashier, and two certificates, each for five shares, were issued to Collier and Norcross, respectively. On January 2, 1891, the three certificates for 990 shares in the name of Collins, cashier, were surrendered, and a single certificate for that number of shares was issued in the name of the California National Bank.

In December, 1890, and January, 1891, five per cent. dividends were declared and paid on the stock of the savings bank. The amount of each dividend received by the California National Bank was \$750. No direct evidence was introduced accounting for these payments having been made on the basis of an ownership of

as alleged, as it was only said in the

1500 shares, when the bank was sought to be held liable for and appeared to be the holder of but 990 shares, put in its name as above stated. Both the savings bank and the national bank became insolvent; the former suspending November 12, 1891, while the receiver of the national bank qualified December 29, 1891.

The cause was tried by the court without a jury, and by findings of fact and conclusions of law rested thereon the court sustained the averments of the complaint, adjudged the national bank to be the holder of 990 shares of the stock of the savings bank, and responsible to the creditors of the savings bank in that proportion. Judgment was entered against the savings bank for \$47,497.75, and against the national bank for \$18,507.52, a payment to the savings bank, however, to be a satisfaction of the judgment against the national bank. Both at the hearing, by objection to the introduction in evidence of the certificate of stock, and in a statement filed with the motion for a new trial, the point was made that the issue of the stock to the bank was void because not shown to have been acquired pursuant to authority of its board of directors, and because the stock was not taken in the ordinary course of the business of the bank as security for the payment of a debt or otherwise. In addition, by the first, second, and third specifications of errors of law occurring at the trial it was specially stated that error had been committed in admitting the certificate in evidence and holding the national bank liable—substantially the same language being employed in each specification—because the national bank, a corporation under the banking laws of the United States, could “not in law become a stockholder or incorporator in any other corporation.” The motion for a new trial was overruled, and an appeal was taken to the Supreme Court of the State, by which court the judgment was affirmed. 101 California, 495. A writ of error was allowed, and the cause has been brought here for review.

Edward Winslow Paige for plaintiff in error.

George Fuller, H. E. Doolittle, and T. L. Lewis for defendant in error, submitted on their brief.

WHITE, J., after stating the case, delivered the opinion of the court.

The suggestion as to the want of jurisdiction is, therefore, without merit.¹

The Federal questions which therefore arise on the record may be thus stated: 1. Do the statutes of the United States, Rev. Stat. § 5136 *et seq.*, relating to the organization and powers of national banks, prohibit them from purchasing or subscribing to the stock

¹ So much of the opinion as relates to this question has been omitted.—Ed.

of another corporation? 2. If a national bank does not possess such power, can the want of authority be urged by the bank to defeat an attempt to enforce against it the liability of a stockholder?

As to the first question: It is settled that the United States statutes relative to national banks constitute the measure of the authority of such corporations, and that they cannot rightfully exercise any powers except those expressly granted, or which are incidental to carrying on the business for which they are established. *Logan County Bank v. Townsend*, 139 U. S. 67, 73. No express power to acquire the stock of another corporation is conferred upon a national bank, but it has been held that, as incidental to the power to loan money on personal security, a bank may in the usual course of doing such business accept stock of another corporation as collateral, and by the enforcement of its rights as pledgee it may become the owner of the collateral and be subject to liability as other stockholders. *National Bank v. Case*, 99 U. S. 628. So, also, a national bank may be conceded to possess the incidental power of accepting in good faith stock of another corporation as security for a previous indebtedness. It is clear, however, that a national bank does not possess the power to deal in stocks. The prohibition is implied from the failure to grant the power. *First National Bank v. National Exchange Bank*, 92 U. S. 122, 128.

On behalf of the plaintiff below it was admitted at the trial that the stock of the savings bank was not "taken as security or anything of the kind," and it is not disputed in the argument at bar that the transaction by which this stock was placed in the name of the bank was one not in the course of the business of banking for which the bank was organized.

2. The transfer of the stock in question to the bank being unauthorized by law, does the fact that, under some circumstances, the bank might have legally acquired stock in the corporation estop the bank from setting up the illegality of the transaction?

Whatever divergence of opinion may arise on this question from conflicting adjudications in some of the State courts, in this court it is settled in favor of the right of the corporation to plead its want of power, that is to say, to assert the nullity of an act which is an *ultra vires* act. The cases of *Thomas v. Railroad Co.*, 101 U. S. 71; *Pennsylvania Railroad v. St. Louis, Alton, etc., Railroad*, 118 U. S. 290; *Oregon Railway & Navigation Co. v. Oregonian Railway Co.*, 130 U. S. 1; *Pittsburgh, Cincinnati, etc., Railway v. Keokuk & Hamilton Bridge Co.*, 131 U. S. 371; *Central Transp. Co. v. Pullman's Car Co.*, 139 U. S. 24; *St. Louis, etc., Railroad v. Terre Haute & Indianapolis Railroad*, 145 U. S.

393; *Union Pacific Railway v. Chicago, etc., Railway*, 163 U. S. 564, and *McCormick v. Market Nat. Bank*, 165 U. S. 538, recognize as sound doctrine that the powers of corporations are such only as are conferred upon them by statute, and that, to quote from the opinion of the court in *Central Transp. Co. v. Pullman's Palace Car Co.*, 139 U. S. 24, 59, 60:

"A contract of a corporation, which is *ultra vires*, in the proper sense, that is to say, outside the object of its creation as defined in the law of its organization, and therefore beyond the powers conferred upon it by the legislature, is not voidable only, but wholly void, and of no legal effect. The objection to the contract is, not merely that the corporation ought not to have made it, but that it could not make it. The contract cannot be ratified by either party, because it could not have been authorized by either. No performance on either side can give the unlawful contract any validity, or be the foundation of any right of action upon it."

This language was also cited and expressly approved in *Jacksonville, etc., Railway v. Hooper*, 160 U. S. 514, 524, 530.

As said in *McCormick v. Market National Bank*, 165 U. S. 538, 549:

"The doctrine of *ultra vires*, by which a contract made by a corporation beyond the scope of its corporate powers is unlawful and void and will not support an action, rests, as this court has often recognized and affirmed, upon three distinct grounds: The obligation of any one contracting with a corporation to take notice of the legal limits of its powers; the interest of the stockholders not to be subject to risks which they have never undertaken; and above all, the interest of the public that the corporation shall not transcend the powers conferred upon it by law. *Pearce v. Madison & Indianapolis Railroad*, 21 How. 441; *Pittsburgh, Chicago, etc., Railway v. Keokuk & Hamilton Bridge Co.*, 131 U. S. 371, 384; *Central Transp. Co. v. Pullman's Palace Car Co.*, 139 U. S. 24, 48."

The doctrine thus enunciated is likewise that which obtains in England. *Ashbury Railway Carriage & Iron Co. v. Riche*, L. R. 7 H. L. 653; *Attorney-General v. Great Eastern Railway Co.*, 5 App. Cas. 473; *Baroness Wenlock v. The River Dee Co.*, 10 App. Cas. 354; *Trevor v. Whitworth*, 12 App. Cas. 409; *Ooregum Gold Mining Co. of India v. Roper* (1892), App. Cas. 125; *Mann v. Edinburgh Northern Tramways* (1893), App. Cas. 69.

Applying the principles of law thus settled to the case at bar, the result is free from doubt.

The power to purchase or deal in stock of another corporation, as we have said, is not expressly conferred upon national banks, nor is it an act which may be exercised as incidental to the powers

expressly conferred. A dealing in stocks is consequently an *ultra vires* act. Being such, it is without efficacy. *Pearce v. Railroad Co.*, 22 How. 441, 445. Stock so acquired creates no liability to the creditors of the corporation whose stock was attempted to be transferred. *Cook on Stock and Stockholders*, vol. 1, p. 435, note 1 to sec. 316, and authorities there cited.

In the *Royal Bank of India's* case, L. R. 4 Ch. 252 (1869), while it was held by the Court of Appeal that, as incidental to the power to advance money on a deposit of shares of stock, a corporation might do such acts as were reasonable and proper for making the security available, it was conceded that a purchase of stock of another company as a speculation would have been *ultra vires*, and, despite acts of ownership exercised by the company, the shares might be repudiated at any time.

Selwyn, L. J., said (p. 261) :

"If it could have been shown that it was an act absolutely prohibited by their memorandum of articles of association, then, no doubt, a different question would have arisen; the act would have been *ultra vires* and incapable of confirmation or ratification."

Giffard, L. J., said (p. 262) :

"I quite agree that the *Royal Bank of India* had no authority to speculate in shares, and that if it had gone upon the Stock Exchange and bought shares as a speculation, such a proceeding would have been *ultra vires*, and all that has taken place would not have been enough to constitute the *Royal Bank of India* shareholders in this bank, or prevent them from repudiating these shares."

In *Ex parte* Liquidators of the *British Nation Life Assurance Association*, L. R. 8 Ch. Div. 679 (1879), the Court of Appeals (James, Baggally, and Thesiger, L. JJ.) discharged an order of an arbitrator which had put the *British Nation Association* on the list of contributories of the *British Commercial Insurance Co.*, a corporation in the process of being wound up. Pursuant to authority conferred by its deed of settlement, the *British Nation Association* had, through its directors, purchased the business of the *British Commercial Insurance Co.* Under the agreement entered into between the companies, certain stock of the *British Commercial Co.* was transferred to the trustees appointed by the *British Nation Co.* Subsequently this stock was transferred into the name of the association, and it was sought to hold it liable as stockholder, because of its alleged ownership of such stock. James, L. J., delivered the opinion of the court, holding that while the *British Nation Association* was empowered to purchase for investment shares of a certain character, it was not empowered to purchase stock which would practically constitute it a partnership

in business speculations or adventures, and that the transfer of the stock in question into the name of the bank was *ultra vires* and void. It was further held that the shareholders who had transferred the stock to the British Nation Association had no power, as between themselves and the association, to transfer their liability to the latter, and that—

“No other person or body of persons could be prejudiced or benefited or affected by an instrument to which they were absolutely strangers, such instrument being void as between the parties to it.”

The case before the court was declared to be not one of a person induced to become a shareholder, and who had become a shareholder by fraud, but that of a person who had never in fact become a shareholder.

The circumstance that the dealing in stocks by which, if at all, the stock of the California Savings Bank was put in the name of the California National Bank, was one entirely outside of the powers conferred upon the bank, and was in nowise the transaction of banking business or incidental to the exercise of the powers conferred upon the bank, distinguishes this case from the class of cases relied upon by the defendant in error. *National Bank v. Whitney*, 103 U. S. 99; *National Bank v. Matthews*, 98 U. S. 621. The difference between those cases and one like this was referred to in *McCormick v. Market National Bank of Chicago*, *supra*, and it is, therefore, unnecessary to particularly review them. The claim that the bank in consequence of the receipt by it of dividends on the stock of the savings bank is estopped from questioning its ownership and consequent liability, is but a reiteration of the contention that the acquiring of stock by the bank under the circumstances disclosed was not void but merely voidable. It would be a contradiction in terms to assert that there was a total want of power by any act to assume the liability, and yet to say that by a particular act the liability resulted. The transaction being absolutely void, could not be confirmed or ratified. As was said by this court in *Union Pacific Railway v. Chicago, etc., Railway*, 163 U. S. 564, speaking through Fuller, Ch. J. (p. 581):

“A contract made by a corporation beyond the scope of its powers, express or implied, on a proper construction of its charter, cannot be enforced, or rendered enforceable by the application of the doctrine of estoppel.”

It follows from the foregoing that the judgment of the Supreme Court of California against the bank was erroneous, and it must, therefore, be reversed.

HARLAN, J., dissented.

Harlan
 5-10-06
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 9 " 4-4-6
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SECTION X.—POWER TO MAKE BY-LAWS.

CHILD v. HUDSON'S BAY CO.

IN CHANCERY, BEFORE LORD MACCLESFIELD, C., HILARY TERM,
1723.

[Reported in 2 Peere Williams 207.]

SIR STEPHEN EVANS was one of the proprietors of the stock of the Hudson's Bay Co., which company are made a corporation by charter, and are thereby empowered to make by-laws for the better government of the company, and for the management and direction of their trade to Hudson's Bay.

Accordingly they made a by-law, that if any of their members should be indebted to the company his stock in the company should be in the first place liable to the debts which such member should owe the company; and that the company might seize and detain the said stock for the debts due to them.

One J. S. was instructed to act for them upon a project of insurances on marriages and apprentices, namely, that on the husband's or apprentice's paying down such a sum to the said J. S. that then the said J. S. should pay so much to the widow of the said husband, in case she survived; or to the apprentice, if he should come out of his apprenticeship and set up a trade; and the said J. S. was only a servant of the company's, who received in, and made orders to issue and pay out this money; and it was on this account, and in trust for the company, that Sir Stephen Evans was indebted to the said J. S.

Afterward, on Sir Stephen Evans's becoming a bankrupt, the assignees under the commission brought a bill against the company, showing that the said Sir Stephen Evans had £1500 in their stock, and praying an account of the profits and dividends thereof.

The defendants the company insisted that Sir Stephen Evans was indebted to J. S., their trustee, in the sum of —, and that Sir Stephen's stock ought to be liable to pay that debt.

Objected for the plaintiffs (by *Wearg*, Solicitor-General) that this by-law of the company was void, namely, that the stock of the company should be liable to any one debt in preference to another; for that all debts ought to be paid according to course of law, and no by-law could be made to the prejudice of a third person, who might be a creditor, so as to postpone him; that it was as if two copartners, on their entering into copartnership, should covenant that the stock of each partner should be first liable to the

debts which he should owe to the other partner, before the debts which he should owe to any other person.

LORD CHANCELLOR. This is a good by-law; for the legal interest of all the stock is in the company, who are trustees for the several members, and may order that the dividends to be made shall be under particular restrictions, or terms; and by the same reason that this by-law is objected to, the common by-laws of companies, to deduct the calls out of the stocks of the members refusing to pay their calls, may be said to be void.

As to the other part of the by-law, empowering the company to detain and seize the stock of such member, that is also good; but then there ought to be some act done by the company, to order or declare that the stock of such member is seized for the debt due to the said company; but this being a by-law, to the prejudice of other creditors, it shall be taken strictly, and not to extend to such debt as the member does not owe in law, but only in equity; and in the present case this is in law a debt due to J. S.

A corporation has an implied power to make by-laws; but where the charter gives the company a power to make by-laws, they can only make them in such cases as they are enabled to do by the charter; for such power given by the charter implies a negative, that they shall not make by-laws in any other cases.

Thus, where the company, in the principal case, have a power given them by the charter to make by-laws for the management of their trade to Hudson's Bay, this power implies a negative, that they cannot make any other by-laws; *a fortiori* they cannot make by-laws in relation to projects and insurances, which by act of Parliament are declared to be illegal.

By law to be construed strictly.

where a law is given and enumerated then they include everything else.

WILLIAM H. IRELAND v. GLOBE MILLING & REDUCTION CO.

IN THE APPELLATE DIVISION OF THE SUPREME COURT OF RHODE ISLAND, SEPTEMBER 19, 1895.

[Reported in 19 Rhode Island Reports 180.]

ASSUMPSIT for refusing to transfer stock. On demurrers to the pleas and replications.

TILLINGHAST, J. The pleadings in this case present two questions for our decision, namely, first, is the stock of a non-resident, in a foreign corporation, doing business in this State, attachable

here?¹ And second, are the by-laws of the defendant corporation set up in its third special plea in bar, taken in connection with the statutes of the State of Maine relating to the transfer of stock in corporations, which are also pleaded, effectual to prevent William R. Stearns, the assignor of the stock in question, from transferring the same to the plaintiff by a mere endorsement and delivery thereof, so as to confer upon him the right to maintain this action?

The first and second pleas set up as an excuse for the refusal of said defendant corporation to transfer said stock, the fact that at the time of the making of the request by the plaintiff for said transfer, the stock was under two attachments as the property of said Stearns, and hence that it could not safely transfer the same. The third plea sets up that the defendant corporation was organized August 10, 1892, under the laws of the State of Maine, at Saco, by articles of agreement or association, to which articles said Stearns was a subscribing party, and that in the proceedings of organization he participated and was then and there elected president and a director of said corporation, which offices he filled during the ensuing year; and that then and there, as a part of the proceedings of the organization of said company, certain by-laws were unanimously adopted by said Stearns and the other incorporators of the company in relation to the transfer of stock and other matters, among which by-laws were the following:

“ARTICLE III.—CAPITAL STOCK.

“SECTION 2. No stockholder shall assign and transfer his stock, or any part thereof, to any person, unless he shall first offer the same to the corporation at the lowest price at which he is willing to sell and assign the same. If in thirty days after such offer shall have been made in writing to the corporation, said corporation shall refuse or neglect to purchase the stock so offered, the owner thereof may sell and transfer the same to any other person at not less than the price stated in said offer.

“SECTION 3. Shares may be transferred by endorsement on the certificates of stock and delivery thereof, but shall not be valid (except between the parties thereto) until the same shall be recorded in proper form upon the books of the corporation. Upon surrender a new certificate or certificates shall be issued and the surrendered certificate or certificates shall be cancelled and replaced and secured in the certificate book.”

Said third plea then proceeds to state that said by-laws had been adopted and were in force at the time, and before the time when the certificates of stock mentioned and described in the dec-

¹ So much of the opinion as relates to this question should be considered in connection with the cases *infra*, pp. —Ed.

laration, or any certificate of stock in the said corporation, had been issued, and that all said certificates were and are subject to said by-laws and the provisions thereof, which by-laws, from their adoption till now, have been continuously in force, of which by-laws and the operation thereof said Stearns and said plaintiff, at and before the sale set out in plaintiff's declaration, had knowledge; that said Stearns had not before the alleged sale offered to said corporation his said stock at any price whatever, nor had in any manner complied with the by-laws concerning the transfer of his said stock, of which non-compliance with said by-laws by said Stearns the plaintiff had knowledge at the time of and before said sale; wherefore the defendant, having said lien of option upon said stock by reason of said by-law, declined to register said transfer of said stock, because said Stearns had as aforesaid failed to comply with said by-law relating to said transfers. Said plea, as amended by agreement of the parties since the hearing of the case, also sets up the statutes of the State of Maine in force at the time of the organization of the defendant corporation, relating to the organization and management of corporations, namely, Chapter 48, sections 16, 17, 18 and 19.

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As to the first question: We think it is well settled that shares of stock owned by a non-resident defendant in a foreign corporation cannot be reached by a process of attachment, although the officers of the corporation are within the State and the business of the corporation is being carried on here. The *situs* of the stock for the purposes of attachment and execution is the domicile of the corporation, and that place only. See Cook on Stock and Stockholders and Corporation Law, 3d ed., § 485, and cases cited; Plimpton v. Bigelow, 93 N. Y. 592; 23 Amer. & Eng. Encyc. of Law, 632, and cases cited; Winston v. Fletcher, 53 Conn. 390.

A corporation can have but one legal residence, and that must be within the State or sovereignty creating it, although by comity, it may be allowed to do business, through its officers and agents, in other jurisdictions. Chaffee v. Fourth National Bank, 71 Me. 514.

Our statute which authorizes "the attachment of the shares of the defendant in any corporation," etc.—Judiciary Act, c. 33, § 20—"is to be construed," as said by the court in Plimpton v. Bigelow, *supra*, concerning a similar statute of New York, "in view of the fundamental principle upon which all attachment proceedings rest, that the *res* must be actually or constructively within the jurisdiction of the court issuing the attachment in order to any valid or effectual seizure under the process." See also Taft & Co. v. Mills & Co., 5 R. I. 393. In the case at bar the stock in question was neither actually nor constructively in this State at the

time of the attempted attachment thereof, and hence the proceeding was a nullity. And this statement is equally applicable to the attempted proceeding by trustee process or garnishment, set out in the pleadings, as to the said attachment proceeding; although we do not wish to be understood as intimating that shares of stock in a corporation can be reached in this way. In this connection see Lowell on Transfer of Stock, § 9, and cases cited.

As to the second question: We do not think the defendant corporation had power to enact the by-law first above quoted. Section 6 of chapter 46 of the Statutes of Maine, set up in the defendant's third special plea, provides that "Corporations may determine by their by-laws the manner of calling and conducting meetings; the number of members that constitute a quorum; the number of votes to be given by the shareholders; the tenure of office of the several officers; the mode of voting by proxy, and of selling shares for neglect to pay assessments; and may enforce such by-laws by penalties not exceeding \$20." And the rule is that where by the provisions of the particular charter, or by a general statute relating to corporations, power is conferred upon a corporation to enact by-laws for certain specified purposes, its power of legislation is limited to the cases and objects enumerated, all others being excluded by implication. "*Expressio unius est exclusio alterius.*" See Angell & Ames on Corporations, 5th ed. § 325; *Child v. Hudson's Bay Co.*, 2 P. Wms. 207; *Kennebec & Portland R. R. Co.*, 31 Me. 470; *Chouteau Spring Co. v. Harris*, 20 Mo. 382. The defendant corporation, then having no power to enact the by-law in question, it becomes unnecessary to consider whether or not it was a reasonable enactment, as contended by defendant's counsel.

The defendant's demurrers to plaintiff's replications to the first and second pleas are overruled, and said replications are sustained, and the plaintiff's demurrer to the defendant's third plea is sustained and the plea overruled, and the case remitted to the Common Pleas Division for further proceedings.

William H. Sweetland for plaintiff.

Warren R. Perce for defendant.

The Plaintiff deposited \$2000 with the Debt
bank and agreed to leave it with the
bank until Aug. 10. As this amounted to
a loan to the bank, which was prohibited
by statute the contract was ultra vires.
Before Aug. 10 Plaintiff brings this
action to recover the deposit.
The Debt. pleaded CHAPTER IV.

That where
money has been
paid on an illegal contract
the court will allow
RIGHTS AND OBLIGATIONS ARISING UNDER
ULTRA VIRES CONTRACTS.

BENJAMIN F. WHITE v. THE PRESIDENT, ETC., OF THE
FRANKLIN BANK.

IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS, JUNE 24,
1839.
[Reported in 22 Pickering 181.]

By an agreed statement of facts, it appeared that on the 10th
of February, 1837, the plaintiff deposited with the defendants the
sum of \$2000, and received from them a book containing the fol-
lowing words and figures, to wit:

"Dr. Franklin Bank in account with B. F. White, Cr. 1837,
February 10th. To cash deposited, \$2000. The above deposit to
remain until the 10th day of August. E. F. Bunnell, Cashier."

It further appeared, that on the 7th of July, 1837, the plaintiff
brought this action against the bank to recover the money so de-
posited by him, declaring on the money counts, and on an account
stated.

If the court should be of opinion that the action could be main-
tained, the defendants were to be defaulted and judgment ren-
dered for the sum of \$2000, with interest; otherwise the plaintiff
was to become nonsuit.

Fletcher and Sewall for plaintiffs.

Ward for the defendants.

WILDE, J., delivered the opinion of the court. The first ground
of the defense is, that the action was prematurely commenced.
The entry in the book given to the plaintiff by the cashier of the
bank is undoubtedly good evidence of a promise to pay the amount
of the deposit on the 10th day of August; and if this was a valid
and legal promise, this action cannot be maintained. But it is
very clear that this promise or agreement that the deposit should
remain in the bank for the time limited is void by virtue of the
Revised Statute, c. 36, sec. 57, which provides that no bank shall

indemnify or assume liability.

The court also notes the distinction between
executed and executory contracts. In the
latter the court will interfere.

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make or issue any note, bill, check, draft, acceptance, certificate, or contract, in any form whatever, for the payment of money, at any future day certain, or with interest, excepting for money that may be borrowed of the commonwealth, with other exceptions not material in the present case.

The agreement that the deposit should remain until the 10th day of August amounts in law, by the obvious construction and meaning of it, to a promise to pay on that day. This, therefore, was an illegal contract and a direct contravention of the statute. Such a promise is void; and no court will lend its aid to enforce it. This is a well settled principle of law. It was fully discussed and considered in the case of *Wheeler v. Russell*, 17 Mass. R. 281; and the late Chief Justice, in delivering the opinion of the court, remarked "that no principle of law is better settled than that no action will lie upon a contract made in violation of a statute, or of a principle of the common law." The same principle is laid down in *Springfield Bank v. Merrick*, 14 Mass. R. 322, and in *Russell v. De Grand*, 15 Mass. R. 39. In *Belding v. Pitkin*, 2 Caines's R. 149, Thompson, J., said: "It is a first principle, and not to be touched, that a contract, in order to be binding, must be lawful." The same principle is fully established by the English authorities. In *Shiffner v. Gordon*, 12 East, 304, Lord Ellenborough laid it down as a settled rule "that where a contract which is illegal remains to be executed the court will not assist either party in an action to recover for the non-execution of it."

It is therefore very clear, we think, that no action can be maintained on the defendants' express promise, and that if the plaintiff be entitled to recover in any form of action, it must be founded on an implied promise.

The second objection, and that on which the defendants' counsel principally rely, proceeds on the admission that the contract is illegal; and they insist that where money has been paid by one of two parties to the other, on an illegal contract, both being *particeps criminis*, no action can be maintained to recover it back. The rule of law is so laid down by Lord Kenyon, in *Howson v. Hancock*, 8 T. R. 577, and in other cases. This rule may be correctly stated in respect to contracts involving any moral turpitude, but when the contract is merely *malum prohibitum*, the rule must be taken with some qualifications and exceptions, without which it cannot be reconciled with many decided cases. The rule as stated by Comyns, in his treatise on contracts, will reconcile most of the cases which are apparently conflicting. "When money has been paid upon an illegal contract it is a general rule that if the contract be executed, and both parties are *in pari delicto*, neither of them can recover from the other the money so paid; but if the

... as *malum in se*
" *prohibition*

contract continues executory, and the party paying the money be desirous of rescinding it, he may do so, and recover back his deposit by action of indebitatus assumpsit for money had and received. And this distinction is taken in the books—namely, where the action is in affirmance of an illegal contract, the object of which is to enforce the performance of an engagement prohibited by law, clearly such an action can in no case be maintained; but where the action proceeds in disaffirmance of such a contract, and instead of endeavoring to enforce it, presumes it to be void and seeks to prevent the defendant from retaining the benefit which he derived from an unlawful act, there it is consonant to the spirit and policy of the law, that the plaintiff should recover." 2 Com. on Contr. 109.

The rule, with these qualifications and distinctions, is well supported by the cases collected in Comyns and by later decisions. The question then is, whether, in conformity with these principles, upon the facts agreed, this action can be maintained.

The first ground on which the plaintiff's counsel rely, in answer to the defendants' objection is, that there was no illegality in making the deposit, and that the illegality of the transaction is confined to the promise of the bank, and the security given for the repayment, that alone being prohibited by the statute.

The leading case on this point is that of *Robinson v. Bland*, 2 Burr. 1077. That was an action on a bill of exchange given for money lent and for money won at play. By the St. 9 Anne, c. 14, it was enacted that all notes, bills, bonds, judgments, mortgages or other securities for money won or lent at play should be utterly void. The court held that the plaintiff was not entitled to recover on the bill of exchange, but that he might recover on the money counts for the money lent, although it was lent at the same time and place that the other money for which the bill was given was won. The same principle was laid down in the cases of *Utica Ins. Co. v. Scott*, 19 Johns. R. 1; *Utica Ins. Co. v. Caldwell*, 3 Wendell, 296; and *Utica Ins. Co. v. Bloodgood*, 4 Wendell, 652. In these cases the decisions were, that although the notes were illegal and void as securities, yet that the money lent, for which the notes were given, might be recovered back. The principle of law established by these decisions is applicable to the present case. The only doubt arises from the meaning of the word "contract," in the prohibitory statute. But taking that word in connection with the other words of prohibition, we think it equivalent to the promise of the bank; and that the intention of the legislature was to prohibit the making or issuing of any security in any form whatever, for the payment of money at any future day.

The next answer to the objection of the defendants is, that although the plaintiff may be considered as being *particeps criminis* with the defendants, they are not *in pari delicto*. It is not universally true that a party, who pays money as the consideration of an illegal contract, cannot recover it back. Where the parties are not *in pari delicto*, the rule *potior est conditio defendentis* is not applicable. In *Lacaussade v. White*, 7 T. R. 535, the court say "that it was more consonant to the principles of sound policy and justice, that wherever money has been paid upon an illegal consideration it may be recovered back again by the party who has thus improperly paid it, than by denying the remedy, to give effect to the illegal contract."

This principle, however, is not by law allowed to operate in favor of either party, where the illegality of the contract arises from any moral turpitude. In such cases the court will not undertake to ascertain the relative guilt of the parties, or afford relief to either.

But where money is paid on a contract which is merely prohibited by statute, and the receiver is the principal offender, he may be compelled to refund. This is not only consonant to the principles of sound policy and justice, but is now so settled by authority, whatever doubts may have been entertained respecting it in former times.

In the case of *Smith v. Bromley*, 2 Dougl. 696, note, it was decided that the plaintiff was entitled to recover in an action for money had and received, for money paid by the plaintiff to the defendant for the purpose of inducing him to sign the certificate of a bankrupt, the plaintiff's sister. Lord Mansfield laid down the doctrine on this point, which has been repeatedly confirmed. "If the act is in itself immoral, or a violation of the general laws of public policy, there the party paying shall not have this action; for where both parties are equally criminal against such general laws, the rule is *potior est conditio defendentis*. But there are other laws which are calculated for the protection of the subjects against oppression, extortion, deceit, etc. If such laws are violated, and the defendant takes advantage of the plaintiff's condition or situation, there the plaintiff shall recover." And this doctrine was afterward adhered to and confirmed by the whole court in the case of *Jones v. Barkley*, 2 Dougl. 684.

On this distinction it has ever since been held that where usurious interest has been paid, the excess above the legal interest may be recovered back by the borrower in an action for money had and received. So money paid to a lottery-office-keeper as a premium for an illegal insurance, is recoverable back in an action for money had and received. *Jaques v. Golightly*, 2 W. Bl.

1073. But in *Browning v. Morris*, Cowper, 790, it was decided that where a lottery-office-keeper pays money in consequence of having insured the defendant's tickets, such contract being prohibited by the St. 17 Geo. 3, c. 46, he cannot recover it back, though the premium of insurance paid by the insured to the lottery-office-keeper might be. The distinction on which this case was decided is very material in the present case. Lord Mansfield referred to the determination in *Jaques v. Golightly*, where it was said "that the statute is made to protect the ignorant and deluded multitude, who, in hopes of gain and prizes, and not conversant in calculations, are drawn in by the office-keepers." And he adds, "It is very material that the statute itself, by the distinction it makes, has marked the criminal; for the penalties are all on one side; upon the office-keeper. The man who makes the contract is liable to no penalty. So in usury, there is no penalty upon the party who is imposed upon." The same distinction is noticed and enforced by Lord Ellenborough, in *Williams v. Hedley*, 8 East, 378. In that case it was decided that where money was paid to a plaintiff to compromise a *qui tam* action for usury, it might be recovered back in an action for money had and received; because the prohibition and penalties of the St. 18 Eliz. c. 5, attached only on "the informer or plaintiff, or other person suing out process in the penal action, making composition, etc." It was argued for the defendant in that case, "that as the act of the defendant co-operated with that of the plaintiff in producing the mischief meant to be prevented and restrained by the statute, it was so far illegal, on the part of the defendant himself, as to preclude him from any remedy by suit to recover back money paid by him in furtherance of that object; and that if he was not therefore to be considered as strictly *in pari delicto* with the plaintiff in the *qui tam* action, he was at any rate *particeps criminis*, and in that respect not entitled to recover from his co-delinquent, money which he had paid him in the course and prosecution of their mutual crime." This argument was overruled, and Lord Ellenborough fully approved the doctrine laid down by Lord Mansfield in *Smith v. Bromley*, and the decisions in the several cases in which that doctrine had been confirmed. The same distinction has been recognized in other cases, and was adopted by this court in *Worcester v. Eaton*, 11 Mass. R. 376, in which Parker, Ch. J., after referring to the above cases, said: "This distinction seems to have been ever afterward observed in the English courts; and being founded in sound principle, is worthy of adoption, as a principle of the common law in this country."

The principle is, in every respect, applicable to the present case, and is decisive. The prohibition is particularly levelled against the

bank, and not against any person dealing with the bank. In the words of Lord Mansfield, "The statute itself, by the distinction it makes, has marked the criminal." The plaintiff is subject to no penalty, but the defendants are liable for the violation of the statute to a forfeiture of their charter. To decide that this action cannot be maintained would be to secure to the defendants the fruits of an illegal transaction, and would operate as a temptation to all banks to violate the statute, by taking advantage of the unwary, and of those who may have no actual knowledge of the existence of the prohibition of the statute, and who may deal with a bank without any suspicion of the illegality of the transaction on the part of the bank.

There is still another ground on which the plaintiff's counsel rely. This action proceeds in disaffirmance of an executory illegal contract, and was commenced before the money which the defendants contracted to pay was by the terms of the contract payable; the plaintiff therefore had a right to rescind the contract or rather to treat it as a void contract, and to recover back the consideration money.

It was so decided in *Walker v. Chapman*, Lofft, 342, where money had been paid in order to procure a place in the customs, but the place had not been procured; and in an action brought by the party who paid the money, it was held that he should recover, because the contract continued executory. This case was cited with approbation by Buller, J., in *Lowry v. Bourdieu*, 2 Dougl. 470; and the distinction between contracts executed and executory, he said, was a sound one. The same distinction has been recognized in actions brought to recover back money paid on illegal wagers, where both parties were *in pari delicto*. The case of *Tapenden v. Randall*, 2 Bos. & Pul. 467, was decided on that distinction. Heath, J., said: "It seems to me that the distinction adopted by Buller, J., between contracts executory and executed, if taken with those modifications which he would necessarily have applied to it, is a sound distinction. Undoubtedly there may be cases where the contract may be of a nature too grossly immoral for the court to enter into any discussion of it; as where one man has paid money by way of hire to another to murder a third person. But where nothing of the kind occurs, I think there ought to be *locus paenitentiae*, and that a party should not be compelled against his will to adhere to the contract." The same distinction is recognized in several other cases. 5 T. R. 405; 1 H. Bl. 67; 7 T. R. 535; 3 Taunt. 277; 4 Taunt. 290.

In the case of *Aubert v. Walsh*, 3 Taunt. 277, the authorities were considered, and the law was definitely settled as above stated; and it does not appear that it has ever since been doubted. In

Utica Ins. Co. *v.* Kip, 8 Cowen, 20, the same principle is recognized, although the case was not expressly decided on that point. The distinction seems to be founded in wise policy, as it has a tendency in some measure to prevent the execution of unlawful contracts, and can in no case work injustice to either party.

It is, however, denied by the defendant's counsel that the contract in question was executory, within the true intent and meaning of these decisions, and the doctrine now laid down. This question has not been much discussed, and it is not necessary to decide it in the present case, the court being clearly of opinion that the plaintiff is entitled to recover on the other grounds mentioned. We have considered the question as to the distinction between executory and executed contracts, because it may be of some importance that the law in that respect should not be supposed to be doubtful in our opinion; which might be inferred, perhaps, if we should leave this question unnoticed.

The only remaining question is whether the plaintiff was bound to make a demand on the bank before he commenced his action. The general rule is, that where money is due and payable, an action will lie without any previous demand. But where money is deposited in a bank in the usual course of business, we should certainly hold that a previous demand would be requisite. But if money should be obtained by a bank by fraud, or, as in the present case, by means of an illegal contract, the bank claiming to hold it under such contract, there can be no good reason given why the bank should be exempted from the operation of the general rule. In *Clark v. Moody*, 17 Mass. R. 145, it was held that if a factor should render an untrue account, claiming a greater credit than he was entitled to, the principal would have a right of action without a demand.

If the defendants had sold to the plaintiff a post-note payable at a future day, it could hardly be doubted that an action would lie to recover back the consideration money, without any previous demand; and there seems to be no substantial distinction between such a case and the one in question.

Judgment on default.

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The ^{church} ~~the~~ ^{decided} ~~decided~~ ^{are} ~~to~~ ^{its} ~~property~~ ^{to} ~~the~~ ^{the} ~~11th~~ ^{church}, ~~the~~ ^{to} ~~pay~~ ^{and} ~~the~~ ^{the} ~~two~~ ^{the} ~~churches~~ ^{are} ~~to~~ ^{be} ~~united~~ ^{and} ~~be~~ ^{responsible} ~~for~~ ^{the} ~~debt~~ ^{of} ~~the~~ ^{the} ~~11th~~ ^{church}. This action

756 MADISON AV. BAP. CHURCH v. BAP. CHURCH. [CHAP. IV.

was sanctioned by its supreme court. In answer and
with this agreement the 11th ^{church} ~~the~~ ^{property}

THE MADISON AVENUE BAPTIST CHURCH, APPELLANT AND RESPONDENT, v. THE BAPTIST CHURCH
IN OLIVER STREET, APPELLANT AND RESPONDENT.

Suits etc. ^{the} ~~the~~ ^{11th} ~~the~~ ^{church}

IN THE COURT OF APPEALS OF NEW YORK, MARCH 19, 1878.

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340. Several

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[Reported in 73 New York Reports 82.]

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commenced

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to recover

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But the

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it repays the

property.

the fact that

a contract has been

executed does not make it a good contract

if it was ultra vires in the beginning, yet

in some cases the fact will be excluded from

APPEAL by both parties from judgment of the General Term of the Superior Court of the city of New York, affirming a judgment, entered upon a decision of the court at Special Term. (The decision upon a former appeal is reported in 46 N. Y., 131.) (Reported below, 9 J. & S., 369.)

This was an action of ejectment, commenced July 30, 1863, to recover possession of certain real estate situate upon Madison avenue, in the city of New York, with a church edifice thereon.

The answer alleged in substance that the defendant entered into possession of the premises in October, 1862, under a deed from the plaintiff, executed in pursuance of an order of the Supreme Court, upon plaintiff's petition. The petition and deed were the result of a plan of union previously adopted by the two corporations parties hereto, which provided for the extinction of the plaintiff's corporation, the surrender of all its property to the defendant, the transfer of its name and of all its members to the defendant's society. The answer set forth the plan of union, the petition, the Supreme Court order, and conveyance under it, possession under the deed with plaintiff's consent, and claimed the fee thereunder, and that its possession be confirmed. It also alleged payment by defendant of plaintiff's debts to the amount of \$16,154.23, and purchase by and assignment to it of a bond and mortgage given by plaintiff for \$12,500; also claimed the rights of mortgagee in possession, under said mortgage, and foreclosure in case its title in fee was not sustained, and also reimbursement

for the moneys paid by the defendant on plaintiff's account while in possession. The petition signed by the plaintiff's trustees stated in substance that the plaintiff was the owner of the lots in question, and had erected a church edifice thereon, the whole costing \$122,000. That their present indebtedness was \$73,000, sixty-one of which was secured by mortgages upon the property. That from various causes stated in the petition it was unable to pay its liabilities or meet the current expenses of the church. That the plaintiff and defendant (a religious corporation under the laws of the State, located in Oliver street, and which for some time had contemplated disposing of its property, and moving up-town),

it repays the consideration paid for the

property. The fact that a contract has been

executed does not make it a good contract

if it was ultra vires in the beginning, yet

in some cases the fact will be excluded from

had formed a plan and made arrangements for uniting the two churches upon the following terms: That the plaintiff should convey all its property to the defendant, and that the members of the Madison Avenue Baptist Church were to become and be members of the Oliver Street Baptist Church, and thereupon the regular services of the united churches were to be held in the house of worship then owned by the plaintiff. That the trustees of the defendant were to resign, and a new election of trustees had by the united church and congregation. That thereupon the defendant was to take the corporate name of the plaintiff. That the real and personal property of both was to become liable for the indebtedness of both. An agreement for disposing of the pews in the edifice of the plaintiff after the union was consummated. That the plan of union had been agreed to by both corporate bodies. That the defendant owned property over and above its indebtedness of the value of from \$50,000 to \$65,000, which, upon the consummation of the union, would become applicable to the payment of the debts of the plaintiff, and that by the union the creditors of the plaintiff would obtain that amount of additional security for the payment of their debts. That the two churches had obtained subscriptions for about \$15,000, to be applied to the payment of the floating indebtedness of each. Then follows a statement of a number of pew owners and pew hirers concurring in the application, that the others favor it, and that the rights of pew owners and holders will be protected.

Defendant put in a supplemental answer setting forth the purchase by and assignment to it, October 17, 1863, of another bond and mortgage, executed by plaintiff, of \$30,000, the whole of which was due, and averred that defendant was lawfully in possession of the premises under said mortgage. It alleged, also, that it held, as assignee, certain bonds then due, executed by plaintiff, secured by a trust mortgage on the premises, and alleged payment of other debts of plaintiff, not set forth in the answer, to the amount of \$2224.18. Judgment of foreclosure upon the \$30,000 was demanded.

Plaintiff put in a supplemental complaint, claiming that if it should be adjudged that defendant acquired any right of foreclosure or of possession under the mortgages, or any right of lien for the reimbursement of sums paid out on account of plaintiff's debts, that an account should be taken of rents and profits, and defendant should be charged therewith, and be adjudged to surrender the premises upon being paid the balance, if any. The further facts appear sufficiently in the opinion.

George F. Comstock and Addison Brown for plaintiff.

Defendant had no equitable lien.

setting up the illegality.

William R. Martin and Samuel Hand for defendant.

EARL, J. Upon the prior appeal in this case to this court it was decided that the Supreme Court had no jurisdiction to grant the order authorizing the conveyance by the plaintiff of its church property to the defendant, and hence that such conveyance was invalid. It was held that the court could authorize a conveyance only in the case of a sale, and that the facts did not show a sale. It was also held that by the common law in force in this State, religious corporations were restrained from alienating their real estate, and that when the conveyance now in question was made they could alienate their real estate only when authorized by the court, under sec. 11 of the act "to provide for the incorporation of religious societies," passed April 5, 1813, or when authorized by some act of the legislature. *Madison Ave. Baptist Church v. Baptist Church*, in *Oliver street*, 46 N. Y. 131. The case, so far as concerns the sale and conveyance, is the same now in all its essential features as it was before. The jurisdiction of the Supreme Court to make the order authorizing the conveyance depended upon the facts before it when it made the order. Its jurisdiction cannot now be upheld by showing that facts existed which were in no way placed before it, or brought to its attention or considered by it. The Supreme Court based its action entirely upon the petition presented to it by the plaintiff, and the only facts it considered were such as were alleged in that petition, and it was decided that those facts did not give the court jurisdiction to make the order. But if every fact which actually existed had been brought to the attention of the court at the time the order was made, it still would not, within the prior decision of this court, have had jurisdiction to grant the order for the simple reason that all the facts do not show a sale within the meaning of section 11. The whole scheme was to effect a union of the two churches. The defendant was to absorb all plaintiff's property, assume its debts and take its corporate name and all its corporators and the congregation worshipping in its church. No price was agreed upon, as the value of plaintiff's property, which defendant was to pay. The plaintiff was to be dissolved as a corporation, and was to reap no benefit from the conveyance. On the contrary, the conveyance was intended to work its destruction. The defendant was to pay plaintiff's debts, which were mostly a lien upon its property, not for plaintiff's benefit, but for its own benefit. The plaintiff, which was at once to die, could not be benefited by the scheme.

It was argued with much zeal on the part of the defendant that, although the conveyance was *ultra vires*, yet, as it had been executed, and the whole arrangement connected therewith had been

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consummated, it must be permitted to stand. But this point was necessarily involved in the prior appeal to this court, and must have been decided adversely to the defendant. It would nullify the restraining law if the conveyance of a religious corporation could be held valid, because it had executed and delivered its deed, and received the consideration therefor. Corporations may incur responsibilities by acts which are *ultra vires*. But contracts, which they are prohibited from making, whether executory or executed, cannot be held valid. They may sometimes be estopped from asserting the invalidity of such contracts, and thus be practically bound by them. But that is not because the contracts are valid, but because it would be a fraud upon the other party to assert their invalidity. *Bissell v. Mich. So. R. R., 22 N. Y. 258.*

Because an action was continued by the plaintiff and the defendant was estopped from asserting the invalidity of the contract, and the contract was valid in some cases also parties were estopped from asserting the invalidity.

It was, therefore, properly held in the court below, following the prior decision of this court, that the Supreme Court had no jurisdiction to grant the order authorizing the conveyance, and that the title to the property remained in the plaintiff. It remains to be considered whether the rights and obligations of the parties connected with, and dependent upon, the conveyance and transfer of possession of the property to the defendant were properly adjudicated in the court below. In 1862, at the time of the proposed union of the two churches, the plaintiff owned a church in Madison avenue, fully completed and equipped; but it was financially embarrassed, and unable to meet its current expenses. It was largely in debt, and the value of real estate at that time was greatly depressed. Its property had cost about \$122,000. Its debts were at least \$73,000, of which \$61,500 were secured by mortgages upon its real estate. The defendant at the same time owned a church in Oliver street, and real estate in other parts of the city worth upward of \$75,000, and it owed nearly \$16,000, of which \$7000 were secured by a mortgage upon its real estate. Its members desired to secure a place of worship in a more desirable quarter of the city, and negotiations for a union with plaintiff were entered upon and a scheme for the union was devised and agreed upon by plaintiff and defendant, of which the following were the principal features:

The plaintiff was to transfer and convey to the defendant all its real and personal property, and was then to be dissolved. It was to make out a list of its members duly certified by its clerk, and such members were to be received as members of the defendant. The trustees of the defendant were to resign, and six new trustees were to be elected, three from the former members of the plaintiff, and three from the former members of the defendant. The defendant was to have its name changed to that of the plaintiff, and the property of both corporations was to be liable for the debts of

both. After such election of trustees there was to be a sale of the pews in the Madison avenue church, and regular religious services were to be conducted by the defendant in that church. This scheme was substantially carried out. The plaintiff under the order of the Supreme Court conveyed its property to the defendant, and the defendant, by an instrument in writing, agreed to assume and pay all plaintiff's debts. All the plaintiff's members were admitted to membership in defendant's church. Defendant's trustees resigned, and six trustees were elected in their places, as provided in the scheme; and there was a sale of the pews and change of defendant's name, as also provided. The defendant sold its property and realized therefrom over and above the encumbrance thereon, the sum of \$68,400.10. It was one of the conditions upon which the union was to be consummated that both churches should raise by voluntary subscriptions sufficient money to pay off the floating debts of both. Accordingly such subscriptions were made, and the floating debts of both churches were paid, only the sum of \$3400 being raised by the plaintiff, and the balance being raised by the defendant. The defendant took possession of the Madison avenue church, and held possession thereof until November 13, 1876, when possession was delivered to the plaintiff under the judgment in this case. It paid all of plaintiff's debts, except the sum of \$3400 raised by plaintiff as above stated, the amount of its payments being upward of \$68,000. During the whole time it maintained in its church all the services usual in Baptist churches. The church was at all times open to all, and most of plaintiff's former corporators and members attended and participated in the services there conducted.

In the summer of 1863 a majority of plaintiff's trustees having become dissatisfied with what had been done repudiated the conveyance, and the union of the churches, and commenced this action in plaintiff's name to recover back the property conveyed. The result has been that the plaintiff has recovered the possession of the property, and upon an accounting, conducted upon principles laid down by the court below, the defendant has been brought in debt to the plaintiff in the sum of \$9681.20. The plaintiff has back all of its property in good condition, free of debt, which, in 1875, was worth \$225,000; and the defendant, although acting in good faith, has lost all its property, owns no place of worship and is in debt to the plaintiff in the sum of nearly \$10,000. The result is somewhat extraordinary, and would seem to be quite inequitable. It was reached by holding the conveyance void, and then, upon the accounting, crediting defendant with the amount it paid upon plaintiff's debts and charging it with all pew rents received during about fourteen years, and allowing it nothing for the expenses of

maintaining religious services in the church, which exceeded the amount of the pew rents.

So far as I can perceive there was nothing illegal in the scheme, but the conveyance of plaintiff's property. Nothing else done was in violation of any law. The two ecclesiastical bodies could unite and be merged in one. New trustees could be elected, and they could go on and manage the church and maintain services therein. It was not illegal for plaintiff to put defendant in possession of its property upon some arrangement by which it was to maintain the services, and pay up plaintiff's debts, and it could even give the defendant a lien upon its property for any sums it might advance for plaintiff's benefit. *Manning v. The Moscow Presbyterian Society*, 27 Barb. 52. The plaintiff cannot recover back the property and also retain the consideration paid therefor. It was bound to restore to the defendant all it had received on account of the conveyance. This is not disputed. All the facts are set up in the answer, and equitable relief is demanded, and the account between the parties can be taken in this action. The defendant paid plaintiff's debts upon the faith of the title supposed to be conveyed, and upon the faith of the possession and enjoyment of the property, and in precise accordance with its agreement, and the court should not deprive it of this property until the plaintiff has in some way made restoration. There can be no moment of time when the plaintiff is entitled to have both the property and the consideration it received therefor. Restoration by the plaintiff should be a condition in such a case of restoration by the defendant. This, it seems to me, is demanded by general principles of equity and justice, and sanctioned by analogous cases. *Gibert v. Peteler*, 38 N. Y. 165; *Mickles v. Dillaye*, 17 *id.* 80; *Rose v. Watson*, 10 H. L. C. 672; *Dime v. Grace*, 5 DeG. & S. 451.

But there is another ground upon which defendant could claim possession of the property until the plaintiff made restoration.¹

The judgment below must, therefore, be affirmed, so far as it adjudges the deed to the defendant invalid, and the title to be in the plaintiff; and in other respects it must be reversed, and the case must be remitted to the court below for an accounting upon the principles herein indicated, neither party to recover costs against the other in this court.

All concur, except ALLEN, J., not sitting, and MILLER, J., not voting.

Judgment accordingly.

¹ So much of the opinion as relates to this question has been omitted.
—Ed.

19 J. R. 78'

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ROSINA R. DAY v. THE SPIRAL SPRINGS BUGGY CO.

Defendant was incorporated with the purpose of manufacturing carriages. IN THE SUPREME COURT OF MICHIGAN, JUNE 3, 1885.
entered into a contract with the plaintiff to purchase excelsior. [Reported in 57 Michigan Reports 146.]
to purchase excelsior for its use, but as a matter of speculation this was outside of its powers and ultra vires. CASE made after judgment from Kent. (Montgomery, J.) May 1.—June 3.
to purchase excelsior for its use, but as a matter of speculation this was outside of its powers and ultra vires. Assumpsit. Plaintiff had judgment. Affirmed.
to purchase excelsior for its use, but as a matter of speculation this was outside of its powers and ultra vires. Edward Taggart for plaintiff.
to purchase excelsior for its use, but as a matter of speculation this was outside of its powers and ultra vires. Maher & Felker for appellee.

to purchase excelsior for its use, but as a matter of speculation this was outside of its powers and ultra vires. COOLEY, Ch. J. This action is brought to recover the value of thirty-two tons of the article called "Excelsior," which had been received by the defendant of the plaintiff.

to purchase excelsior for its use, but as a matter of speculation this was outside of its powers and ultra vires. The defendant is a corporation, organized, as its articles of association state, "to purchase material for, and manufacture and sell carriages, and carriage and harness hardware; also for the disposing of the right to manufacture on royalty the spiral buggy-spring, Smith's patent." In the manufacture of carriages excelsior is used for upholstering seats and backs, but for no other purpose. The place of business of defendant is Grand Rapids, Michigan.

to purchase excelsior for its use, but as a matter of speculation this was outside of its powers and ultra vires. It was shown on the trial that in April, 1883, defendant contracted with one Hulz, of Chicago, to sell and deliver to him in Chicago one hundred and seventy-four tons of excelsior, the delivery to be made at the rate of two car-loads a month, and the price to be fourteen dollars a ton. For the purposes of this contract defendant then bargained with the plaintiff that she should manufacture the requisite quantity of excelsior and deliver it on board cars or boat at Grand Rapids, billed to Hulz at Chicago. The price to be paid by defendant was eleven dollars and fifty cents a ton, which, after paying cost of transportation, would leave to defendant a profit on the sale to Hulz. It was known to plaintiff, when she contracted for the manufacture, that the defendant was not procuring the article for use in its business, but for the purpose of a sale at a profit in Chicago, where the defendant had no place of business, and the delivery to be made by her was to be made from time to time as required by the Hulz contract. The plaintiff was therefore fully aware that the contract of the defendant with her was purely one of speculation, and had no connection with its legitimate corporate business.

to purchase excelsior for its use, but as a matter of speculation this was outside of its powers and ultra vires. The excelsior was delivered by the plaintiff under the contract from time to time until about June 15, 1883, and was shipped to Chicago under defendant's contract with Hulz. At the time last

to purchase excelsior for its use, but as a matter of speculation this was outside of its powers and ultra vires. damages for breach of the contract.
to purchase excelsior for its use, but as a matter of speculation this was outside of its powers and ultra vires. Dr. The Bill in this respect from setting up the fact that the contract was ultra vires as an excuse for non performance. If the court allowed that to mean for the benefit of the plaintiff it would result in enforcing

*the ultra vires contract. Justice requires
that Debt pay for the excelsior already furnished.
The contract involves no moral turpitude, which
would prevent the courts from interfering.*

CHAP. IV.] DAY v. THE SPIRAL SPRINGS BUGGY CO. 763

mentioned the market value of the article had considerably advanced, and plaintiff declined to deliver any more at the price agreed upon. Part payment had been made for the quantity received, and defendant refused to pay further unless plaintiff should go on in completion of her contract. This suit was accordingly instituted.

The claim of the plaintiff is that the contract she entered into with the defendant was void in law; that therefore she was at no time under obligation to perform it; that, in so far as the defendant has received excelsior from her, she is entitled to recover the value, not exceeding the price agreed upon; and having shown that the value was equal to that price, she now claims to recover it in this suit. The defendant, on the other hand, insists that the plaintiff is estopped by the contract from disputing the capacity of the defendant to enter into it; and that when she refuses to perform, she becomes liable in damages. These damages the defendant seeks to recover from the claim of the plaintiff.

The circuit judge was of opinion that the contract made by the defendant with Holz, not being for a corporate purpose, was *ultra vires* and void, and the contract made with the plaintiff for the purpose of meeting its requirements was void also. For the excelsior actually received by the defendant the plaintiff was held entitled to recover, as if the void contract had not been entered into; but a claim to recoupment must necessarily assume the validity of the contract, and was therefore inadmissible. The judge, therefore, gave judgment for the plaintiff for the value of what had been received, deducting such payments as had been made. The defendant brings error.

It is scarcely denied in this court that the contract of the defendant on which it now relies was *ultra vires*. Its corporate purposes were specified in its articles, and it was without legal power to go beyond them. The contract was one of speculative dealing, and was as much foreign to the purposes of corporate organization as would have been a contract for dealing in grain on the produce exchange, or in shares in the stock market. The State had not by law consented that its manufacturing corporations should be at liberty to make such contracts, but for reasons of sound public policy had withheld from them the power to do so. Neither had the corporators of the defendant consented that their interests might be put in jeopardy by such dealings.

But defendant relies here, as it did in the court below, upon the plaintiff's being estopped by her contract from raising the question of *ultra vires*. She has certainly admitted the power of the defendant to make the contract, and if the elements of an estoppel are to be found in this mere admission, or in this admission coupled

with such action as has taken place under it, then the defendant should be entitled to recoupment.

There are some decisions which give plausibility to the position of the defendant, but we know of none that is adequate to the exigencies of this case. Parties entering into contracts with an association of persons, who are *de facto* exercising corporate powers, are not suffered to dispute the corporate authority which their contracts admit: *Swartout v. Mich. Air-line R. Co.*, 24 Mich. 389; *Wilcox v. Toledo, etc. R. Co.*, 43 Mich. 584. But this is on the principle that a usurpation of corporate authority concerns only the State, and it is supposed the State will move on its own behalf to have the usurpation punished or restrained when it is found to exist, if the occasion seems to call for it. The case before us is not one of that description. The defendant's possession of corporate powers is conceded, and though the particular act was done without authority, the State was not the only party interested in questioning it. Every stockholder was entitled in his own interest to insist on its being repudiated, for he had not consented to put his share of the capital at the risk of any such venture. There are some cases, also, in which parties by false representations have induced others to act upon invalid contracts as if they were valid, and to make payments, deliver property, or otherwise change their positions in reliance upon the contracts, under such circumstances that nothing but the enforcement of the contracts will do complete justice: and in such cases the doctrine of estoppel may well be applied. But this is not such a case. No false representations are alleged, and it is not disputed that all parties were fully aware of all the facts. They must therefore be supposed to have understood that the contract in its inception was *ultra vires*. And the power on the part of such a corporation to enter into contracts of speculation being withheld on reasons of public policy, for the protection of shareholders and the general good of the community, the act neither of one party nor of both in entering into it can work an estoppel against setting up the invalidity. A rule of law established for the public good cannot be thus defeated. A corporation cannot, by the mere act of individuals, be given a power which the State for general reasons has withheld from it. *Pennsylvania, etc., Nav. Co. v. Dandridge*, 8 Gill & J. 248, 319.

Parties may also be estopped, in some cases, from disputing the validity of a corporate contract when it has been fully performed on one side, and when nothing short of enforcement will do justice. To quote the language of Comstock, Ch. J., in *Parish v. Wheeler*, 22 N. Y. 494, 508: "The executed dealings of corporations must be allowed to stand for and against both the parties,

when the plainest rules of good faith so require." But this is not such a case. The contract has only been performed in part. The defendant has received a portion of the property bargained for, and we may justly assume that what has been received has passed into the hands of Hulz and been paid for, so that the defendant will lose nothing but the anticipated profits on the remainder if the contract is not enforced in its favor. Those profits it had no right at any time to count upon; and, in contemplation of law, there can be no injustice in depriving it of profits which the law would not permit it to bargain for. No valid ground for estoppel is therefore found to exist in the case.

The defendant, then, if the plaintiff has established a valid demand, is not entitled to recoup damages for refusal to make complete performance, because to allow recoupment would be indirectly to enforce the contract.

Whether the plaintiff is entitled to recover for the goods delivered and not paid for is the remaining question. The defendant has had the goods, and there is no want of equity in requiring it to make payment. They were delivered under a contract which bound neither party, and though the plaintiff is the party who now refuses to go on with it, the defendant was at liberty to do the same, and we cannot know that it would not have done so if the change in market value had been such as to make it for its interest. But however that may be, if the defendant pays for the property received, the parties will have justice meted out to them as nearly as is now possible.

It is to be observed that the contract, though void in law, involved no element of criminality, and nothing of an immoral nature. The case is not, therefore, one in which the law will leave the parties without redress for the consequences of criminal or immoral action. The plaintiff had a right to sell her manufacture, and to be paid for it; the defendant has received something of value from her, and there is manifest equity in its being required to make payment, notwithstanding it exceeded its powers in the purchase.

The cases of *Pratt v. Short*, 79 N. Y. 437; *Northwestern Union Packet Co. v. Shaw*, 37 Wis. 655; *Harriman v. Baptist Church*, 63 Ga. 186, are in point, and fully sustain the judgment. The principle involved is considered at length in *Whitney Arms Co. v. Barlow*, 63 N. Y. 62, and is supported by *Thomas v. Railroad Co.*, 101 U. S. 71; *In re Cork & Y. Ry. Co.*, L. R. 4 Ch. App. 748; *In re National, etc., Society*, L. R. 5 Ch. App. 309; and many other cases. No doubt it results in a degree of hardship in some cases, when a party fails to obtain all that has been bargained for; but the loss of anticipated advantages, as an incident to unau-

thorized dealings, is one for which the parties themselves are responsible, not the law.

The judgment must be affirmed.

The other justices concurred.

LONG v. GEORGIA PACIFIC RAILWAY COMPANY.

IN THE SUPREME COURT OF ALABAMA, NOVEMBER TERM, 1890.

[Reported in 91 Alabama Reports 519.]

APPEAL from the Chancery Court of Walker.

Heard before the Hon. Thomas Cobbs.

The bill in this case was filed on the 28th November, 1888, by Benj. M. Long against the Georgia Pacific Railway Company, and sought the cancellation of a deed which the complainant had executed to said corporation, conveying the mineral interests in certain lands, which belonged to him, and of which he was still in possession when the bill was filed; a cancellation being sought on the ground that the deed was void, because the corporation had no power to acquire and hold the lands, and was a cloud on complainant's title. The chancellor sustained a demurrer to the bill, and his decree is assigned as error.

Hewitt, Walker & Porter and Coleman & McIntyre for appellant.

James Weatherly contra.

McCLELLAN, J. The case made by the amended bill is this: On April 23, 1883, the complainant, B. M. Long, and his wife, Amanda C. Long, executed to the Georgia Pacific Railway Co. a deed upon valuable consideration presently paid, to and of the iron, coal and oil interests and properties in and pertaining to certain tracts of land, aggregating about four thousand acres; the said Long retaining the fee to said lands, except in respect to said mineral interests, and continuing in possession thereof. The grantee is a corporation, and was and is without power to purchase and hold said land, or the mineral interests in the same. The bill seeks to have the deed declared void because of this incapacity of the corporation, and to have the same cancelled as a cloud upon complainant's title. The bill was demurred to on several grounds, and the demurrer was sustained generally, the decree to that end being now assigned as error.

Only those grounds of error which present the question, whether a vendor who has sold, received payment for, and conveyed land to a corporation, which had no power to hold the

Bill seeks to have the deed declared void because of the incapacity of the corporation to acquire and hold the lands, and was a cloud on complainant's title. The bill was demurred to on several grounds, and the demurrer was sustained generally, the decree to that end being now assigned as error.

same, can have any relief in respect to the transaction, are discussed in argument; and to these our consideration will be confined, since it is manifest that the determination of this question, in line with the decree below, as we think it must be determined, will be fatal, not only to the present appeal, but to complainant's cause of action.

It is thoroughly well settled law that a party to an *ultra vires* executory contract made with a corporation is not estopped to set up the want of corporate capacity in the premises, either by the fact of contracting, whereby the power to contract is, in a sense, admitted or recognized, or by the fact that the fruits or issues of the contract have been received and enjoyed; and this, though the assault upon the transaction comes from the corporation itself. *Marion Savings Bank v. Dunklin*, 54 Ala. 471; *Chambers v. Falkner*, 65 Ala. 448; *Sherwood v. Alvis*, 83 Ala. 115; *Chewacla Lime Works v. Dismukes*, 87 Ala. 344. But, where the contract is fully executed—where whatever was contracted to be done on either hand has been done—a different rule prevails. In such case the law will not interfere, at the instance of either party, to undo that which it was originally unlawful to do, and to the doing of which, so long as the contract to that end remained executory, neither party could have coerced the other. As declared by Mr. Bishop, "the parties voluntarily doing of what they have unlawfully agreed, places them, in effect, in the same position as if the contract had been originally good; neither can recover of the other what was parted with. The reason for which is, that, since they are equally in fault, the law will help neither." Bishop on Contracts, sec. 627.

The former decisions of this court are in line with this doctrine, and fully recognize the distinction between executory and executed void contracts, to the effect that, while suits to enforce the former may always be defended on the ground of their invalidity, no relief prayed upon such ground can be granted with respect to the latter. *Morris v. Hale*, 41 Ala. 510; *Ingersoll v. Campbell*, 46 Ala. 282; *Sherwood v. Alvis*, 83 Ala. 115; *Dudley v. Collier*, 87 Ala. 431; *Craddock v. Mortgage Co.*, 88 Ala. 281. And this is the doctrine generally declared by other courts. *Thomas v. Railroad Co.*, 101 U. S. 71; *Day v. S. S. B. Co.*, 57 Mich. 146; *S. C.*, 52 Amer. Rep. 352; *Parish v. Wheeler*, 22 N. Y. 494; *Miners' Ditch Co. v. Tellerbach*, 37 Cal. 542, 606; *Terry v. Eagle Lock Co.*, 47 Conn. 141.

There is no question but that the case presented by the bill involved a contract on the part of the railway company to buy, and on the part of the complainant to sell, certain interests in the land described. It is equally clear that the payment of the

agreed price on the one hand, and the execution of the conveyance on the other, fully executed this contract on both sides, left nothing to be done by either party in the premises, and bring the transaction within the principle we have been considering, which denies to the complainant any relief in respect to it.

The same conclusion is reached by another well established principle. It is, that when a party sells and conveys property to a corporation, which is without power to purchase and hold the same, and receives compensation therefor, there being no fraud in the transaction, he is in no sense injured or prejudiced by the incapacity of the corporation, nor can he be heard to complain of it; but the question becomes one between the corporation and the State, the sovereign alone having the right to impeach the transaction; and until it supervenes for this purpose, the corporation is vested with perfect title against all the world, defeasible only on office found. *R. & B. Railroad Co. v. Proctor*, 29 Vt. 93; *Leazure v. Hillegas*, 7 Serg. & Rawle, 313; *Goundie v. Northampton Water Co.*, 7 Pa. St. 233; *Baird v. Bank of Washington*, 11 Serg. & Rawle, 411; *Lathrop v. Bank*, 8 Dana, 114, 129; *Hough v. Cook County Land Co.*, 73 Ill. 23; S. C., 24 Amer. Rep. 230; *Cowles v. Springs Co.*, 100 U. S. 55; *Reynolds v. Crawfordsville Bank*, 112 U. S. 405, 413; 2 Mor. Corp. sec. 710.

The decree of the chancellor is affirmed; and the same result is reached in the case of *B. L. Jones and B. B. Long v. Ga. Pac. Railway Co.*, submitted with this case, and involving the same question.

Affirmed.

FRANK B. CHAPMAN, APPELLANT, v. PATRICK LYNCH,
RESPONDENT.

IN THE COURT OF APPEALS OF NEW YORK, OCTOBER 4, 1898.

[Reported in 156 *New York Reports* 551.]

APPEAL from a judgment of the late General Term of the Supreme Court in the Fourth Judicial Department, entered October 9, 1895, affirming a judgment in favor of defendant entered upon a nonsuit granted at the Circuit.

The nature of the action and the facts, so far as material, are stated in the opinion.

Edwin Nottingham for appellant.

Frank Hiscock for respondent.

HAIGHT, J. This action was brought to recover the sum of \$8973.37, the amount due and owing the plaintiff by the American Dairy Salt Company, Limited, a business corporation or-

ganized under chapter 611 of the Laws of 1875. The action is sought to be maintained against the defendant upon the ground that he was a director of the corporation, and as such, in company with his associates, had failed to file the annual report required by the statute during the years 1881 to 1888, inclusive.

This is a twin action to that of *Chapman v. Comstock* (reported in 58 Hun, 325, and in this court in 134 N. Y., 509). The evidence reported upon this trial is in substance the same as that in the former case. The facts as stated in the former case, in this court, are as follows: "On and prior to February 11th, 1882, the plaintiff held a promissory note for \$10,880.90 of the Onondaga Coarse Salt Association, of which Thomas Molloy was treasurer. That company was winding up its business and desired to pay the note. The plaintiff asked Molloy if he had any place he could use the money for him, saying that he had no place for it and did not want to use it at that time. Molloy said he could take it for the American Dairy Salt Company, Limited, of which he was also treasurer. Further conversation took place with reference to the responsibility of the company and its directors, resulting in the plaintiff's leaving the money with that company, and it issued to him a pass book, in which was entered 'Frank B. Chapman in special account with the American Dairy Salt Company, Limited.' Under the credit column was entered, 'February 11, 1882, cash, \$10,880.90,' and semi-annually thereafter interest was credited upon that amount at the rate of six per cent. The plaintiff was subsequently paid \$4,300, April 30th, 1885; \$1,000, June 1st, 1888, and \$1,000, July 11th, 1888, for which receipts were given. Shortly after the last payment was made the company failed and refused to pay the balance, and in October following a receiver was appointed."

It is alleged in the complaint that the money was deposited with the company by the plaintiff, and was payable only upon demand. This allegation was controverted by the answer, in which it was alleged that the money was loaned to the company without time, and was recoverable by the plaintiff at any and all times without demand. It was further alleged in the answer that the corporation was not organized or authorized to do a banking business, or to receive deposits of money, but was forbidden by law from so doing, and that more than three years had elapsed after the cause of action accrued before the commencement of this action.

Upon the trial of the former action the case was submitted to the jury, which found a verdict in favor of the plaintiff. A motion for a new trial was then made upon the minutes of the court, upon the grounds specified in the Code, which motion was denied, and an appeal was then taken to the General Term from the

judgment and from the order denying the new trial. The General Term reversed both the judgment and the order and awarded a new trial. In the order of reversal the General Term certified that it was held and decided, "1. That the verdict ought to have been directed in favor of the defendant, or a nonsuit granted. 2. That the verdict is against the evidence. 3. That the several exceptions taken to the refusal to charge present error."

In the appeal which was brought from the order of the General Term to this court it was here held that the appeal from the order denying the motion for a new trial, made upon the minutes, brought up for review in the General Term the question as to whether the verdict was against the weight of the evidence; and that question being properly before the court, its order reversing the judgment was not reviewable in this court, unless it appeared from the record that the order was affirmed as to the facts, or the appeal therefrom dismissed, following a long line of authorities, which are cited in the report of that case.

In this case another question is now presented, which was not then considered, and that is, assuming the money to have been delivered by the plaintiff to the corporation as a deposit and not payable until demanded, was such a contract valid and authorized, and did it prevent the running of the Statute of Limitations?

The alleged deposit was made on the 11th day of February, 1882. The directors of the corporation did not make the report required by the statute during the years 1881 to 1888, inclusive. This action was commenced on the 27th day of September, 1889. The action is for a penalty, depends wholly upon the statute, and falls within the third subdivision of section 383 of the Code of Civil Procedure. *Losee v. Bullard*, 79 N. Y. 404; *Knox v. Baldwin*, 80 N. Y. 610; *Duckworth v. Roach*, 81 N. Y. 49. The Statute of Limitations commenced to run from the time that the cause of action accrued to the plaintiff. When did it accrue? As we have seen, default in filing the report had already occurred when the deposit was made; but, under the alleged contract for deposit, it is claimed that no action could be maintained thereon until after demand had been made and payment refused. The plaintiff thus had it in his power to prevent the running of the statute by neglecting to make a demand for the money, and thus indefinitely perpetuate the liability of the defendant for the penalty. The claim of the defendant is that the position of the plaintiff is untenable; that if there was a contract that the money should be received by the corporation on deposit, it was *ultra vires*, unauthorized and void, and that an action as for money had and received was available to the plaintiff from the date of the deposit.

Section 13 of the act under which the corporation was organ-

ized provides that it shall be lawful for the corporation to borrow money for its legitimate purposes. It does not, however, authorize it to receive money upon deposit. It is contended on behalf of the appellant that the statute against unauthorized banking, which originally prohibited corporations from receiving deposits unless authorized so to do, was repealed by chapter 402 of the Laws of 1882. However that may be, the Revised Statutes, with reference to the general powers, privileges and liabilities of corporations, were left in force, and so remained until they were incorporated into the General Corporation Law of 1892.

The Revised Statutes, part I, chapter 18, title 3, section 3, first edition, page 600, provide: "In addition to the powers enumerated in the first section of this title and to those expressly given in its charter, or in the act under which it is or shall be incorporated, no corporation shall possess or exercise any corporate powers except such as shall be necessary to the exercise of the powers so enumerated and given.

"Section 4. No corporation created, or to be created, and not expressly incorporated for banking purposes shall by any implication or construction be deemed to possess the power of discounting bills, notes or other evidences of debt, of receiving deposits, of buying gold and silver, bullion, or foreign coins, of buying and selling bills of exchange, or of issuing bills, notes, or other evidences of debt, upon loan, or for circulation as money." Here we have, in the first place, an express statutory provision prohibiting the corporation from exercising powers not given to it which are not necessary for the exercise of the powers for which it was created; and, in the second place, an express prohibition against receiving deposits unless incorporated for banking purposes. Words could hardly be found that would make the meaning more clear.

The American Dairy Salt Company, Limited, was a business corporation, organized for the manufacture of salt. It was incorporated under a statute which authorized the formation of business companies, was adapted for the purposes of such organizations, and contained none of the safeguards which have always been exacted and required of corporations authorized to do a banking business or the receiving of the money of others on deposit for safe keeping or investment. We thus find a reason founded on public policy for the prohibition contained in the statute referred to applying to corporations not expressly incorporated under the statute providing for the incorporation of banks, which contains the safeguards exacted from such corporations which are to engage in the business of dealing with the money of others.

It appears to us that the corporation, in accepting the funds of the plaintiff in special account upon deposit, exceeded its corporate power and engaged in a business in which it was not authorized, and that, consequently, its contract with the plaintiff, if such was its nature, was *ultra vires*; if so, the plaintiff's right of action for the moneys delivered to the corporation at once accrued.

It is not our purpose here to enter upon any discussion as to whether the contract in question was *malum in se*, or was simply a contract unauthorized. The corporation is not here seeking to enforce any of the provisions of the contract. In either case the contract was *ultra vires* and formed no obstacle to an immediate action for the money. Neither do we deem it necessary to enter upon any extended reference to the authorities. The subject of *ultra vires* of contracts has recently been considered in this court in the case of Bath Gas Light Company v. Claffy, 151 N. Y. 24, in which Andrews, Ch. J., and Vann, J., have engaged in an elaborate discussion of the authorities. The cases of New York State Loan and Trust Company v. Helmer, 77 N. Y. 64, and Pratt v. Short, 79 N. Y. 437, while distinguishable in many features, tend strongly to sustain the conclusion which we have reached.

It must be remembered that this action is prosecuted to recover a penalty. The action having once accrued and the statute run against it, the bar becomes complete, notwithstanding the subsequent defaults of the defendant and his associates in filing the annual reports called for by the statute. Neither do we understand that subsequent partial payments by the corporation upon account affect the running of the statute; they may, as to the corporation under its contract to pay, but cannot operate to extend the liability of the defendant for the penalty incurred by him. Rector, etc., v. Vanderbilt, 98 N. Y. 170-175; Losee v. Bullard, 79 N. Y. 404.

Nor do we think that the crediting of the interest upon the account semi-annually affects the liability of the defendant. The cause of action having once accrued, and the defendant having become liable for the penalty, the statute commenced to run, and was not stopped by either credits of payment, or the charges of interest accrued thereafter made by the company.

The judgment should be affirmed, with costs.

All concur, except MARTIN, J., not sitting, and VANN, J., not voting.

Judgment affirmed.

ST. LOUIS, VANDALIA AND TERRE HAUTE RAILROAD COMPANY v. TERRE HAUTE AND INDIANAPOLIS RAILROAD COMPANY.

IN THE SUPREME COURT OF THE UNITED STATES, MAY 16, 1892.

[Reported in 145 United States Reports 393.]

Lyman Trumbull and John M. Butler (with whom were Henry S. Robbins and Perry Trumbull on the brief) for appellant.

George Hoadly for appellee.

GRAY, J., after stating the case as above, delivered the opinion of the court.¹

The object of this suit between two railroad corporations, as stated in the amended bill, is to have a contract—by which the plaintiff transferred its railroad and equipment, as well as its franchise to maintain and operate the road, to the defendant for a term of nine hundred and ninety-nine years—set aside and cancelled, as beyond the corporate powers of one or both of the parties.

The contract, dated February 10, 1868, recites that the plaintiff is a corporation of Illinois, and the defendant a corporation of Indiana; that their railroads connect at the line between the two States; that it is desirable that the two roads should be operated by the defendant as one road; and that the defendant has “proposed to lease and operate” the plaintiff’s road for a period of nine hundred and ninety-nine years. “It is therefore agreed” that, upon the completion of the plaintiff’s road to the state line the defendant “shall take charge of and operate the same with its equipment” for that period, and “shall be allowed sixty-five per cent. of the gross receipts from all traffic moved over the line, or business done thereon, and from the property of the company, as a consideration for working and maintenance expenses,” and shall appropriate the rest of such receipts to the payment of interest on the plaintiff’s mortgage bonds, and pay any surplus to the plaintiff for the benefit of its stockholders. Within a year afterwards the contract was modified by providing that the defendant should be allowed seventy (instead of sixty-five) per cent. of the gross receipts, “but if the working and maintenance expenses of said road shall be less than seventy per cent. of the gross receipts aforesaid, then all of such excess shall be paid over to the” plaintiff. It is further agreed in the contract that the defendant “shall enjoy all the rights, powers and privileges of the” plaintiff, “so far

¹ The statement of facts has been omitted.—Ed.

Requests upon this case seems wrong. (It is land however) & a cancelled contract.

See contract in note 100 p. 11.

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as the same may be needful to maintain and operate said railroad," and may "impose and collect tolls and rates for transportation, and do all other acts and things, as fully and as effectually as the" plaintiff "could do if operating said line."

In short, by this contract one railroad corporation undertook to transfer its whole railroad and equipment, and its privilege and franchise to maintain and operate the road, to another railroad corporation for a term of nine hundred and ninety-nine years, in consideration of the payment from time to time by the latter to the former of a certain portion of the gross receipts. This was, in substance and effect, a lease of the railroad and franchise for a term of almost a thousand years, and was a contract which neither corporation had the lawful power to enter into, unless expressly authorized by the State which created it, and which, if beyond the scope of the lawful powers of either corporation, was unlawful and wholly void, could not be ratified or validated by either or both, and would support no action or suit by either against the other. *Thomas v. Railroad Co.*, 101 U. S. 71; *Pennsylvania Railroad v. St. Louis, Alton & Terre Haute Railroad*, 118 U. S. 290, 630; *Oregon Railway v. Oregonian Railway*, 130 U. S. 1; *Central Transportation Co. v. Pullman's Car Co.*, 139 U. S. 24.

Upon the question whether this contract was *ultra vires* of either corporation, this case cannot be distinguished in principle from *Pennsylvania Railroad v. St. Louis, Alton & Terre Haute Railroad*, above cited.¹

It may therefore be assumed, as contended by the plaintiff, that the contract in question was *ultra vires* of the defendant, and therefore did not bind either party, and neither party could have maintained a suit upon it at law or in equity, against the other.

It does not, however, follow that this suit to set aside and cancel the contract can be maintained. If it can, it is somewhat remarkable that, in the repeated and full discussions which the doctrine of *ultra vires* has undergone in the English courts within the last fifty years, no attempt has been made to bring a suit like this. The only cases cited in the elaborate briefs for the plaintiff, or which have come to our notice, approaching this in their circumstances, are in American courts not of last resort, and present no sufficient reasons for maintaining this suit. *Auburn Academy v. Strong*, Hopkins Ch. 278; *Atlantic & Pacific Telegraph Co. v. Union Pacific Railway*, 1 McCrary, 541; *Western Union Telegraph Co. v. St. Joseph & Western Railway*, 1 McCrary, 565; *Union Bridge Co. v. Troy & Lansingburgh Railroad*, 7 Lansing, 240; *New Castle Railway v. Simpson*, 21 Fed. Rep. 533.

The discussion of this question has been omitted.—ED.

The English cases relied on by the plaintiff were either suits to set aside marriage brokerage bonds, as in *Drury v. Hooke*, 1 Vernon, 412, and *Smith v. Bruning*, 2 Vernon, 392; S. C. *nom.* *Goldsmith v. Bruning*, 1 Eq. Cas. Ab. 89; or to recover back money paid for the purchase, without leave of the Crown, of a commission in the military or naval service, as in *Morris v. McCulloch*, Ambler, 433; S. C. 2 Eden, 190. Those cases have sometimes been justified upon the ground that, the agreement being against the policy of the law, the relief was given to the public through the party. *Debenham v. Ox*, 1 Ves. Sen. 276; *St. John v. St. John*, 11 Ves. 526, 536; *Cone v. Russell*, 3 Dickinson, 48 N. J. Eq. 208. But Sir William Grant explained them as proceeding upon the ground that the plaintiff was less guilty than the defendant. *Osborne v. Williams*, 18 Ves. 379, 382. And *Morris v. McCulloch* can hardly be reconciled with his decision in *Thomson v. Thomson*, 7 Ves. 470, or with the current of later authorities.

The general rule in equity, as at law, is *in pari delicto potior est conditio defendentis*; and, therefore, neither party to an illegal contract will be aided by the court, whether to enforce it or to set it aside. If the contract is illegal, affirmative relief against it will not be granted, at law or in equity, unless the contract remains executory, or unless the parties are considered not in equal fault, as where the law violated is intended for the coercion of the one party and the protection of the other, or where there has been fraud or oppression on the part of the defendant. *Thomas v. Richmond*, 12 Wall. 349, 355; *Spring Co. v. Knowlton*, 103 U. S. 49; *Story Eq. Jur.* sec. 298.

While an unlawful contract, the parties to which are *in pari delicto*, remains executory, its invalidity is a defense in a court of law; and a court of equity will order its cancellation only as an equitable mode of making that defense effectual, and when necessary for that purpose. *Adams* on Eq. 175. Consequently, it is well settled at the present day that a court of equity will not entertain jurisdiction to order an instrument to be delivered up and cancelled, upon the ground of illegality appearing on its face, and when, therefore, there is no danger that the lapse of time may deprive the party to be charged upon it of his means of defense. *Story Eq. Jur.*, sec. 700 *a*, and cases cited; *Simpson v. Howden*, 3 Myl. & Cr. 97; *Ayerst v. Jenkins*, L. R. 16 Eq. 275, 282.

When the parties are *in pari delicto*, and the contract has been fully executed on the part of the plaintiff by the conveyance of property, or by the payment of money, and has not been repudiated by the defendant, it is now equally well settled that neither a court of law nor a court of equity will assist the plaintiff to re-

cover back the property conveyed or money paid under the contract. *Thomas v. Richmond*, above cited; *Ayerst v. Jenkins*, L. R. 16 Eq. 275, 284. For instance, property conveyed pursuant to a contract made in consideration of the compounding of a crime, and the stifling of a criminal prosecution, and therefore clearly illegal, cannot be recovered back at law, nor the conveyance set aside in equity, unless obtained by such fraud or oppression on the part of the grantee, that the conveyance cannot be considered the voluntary act of the grantor. *Worcester v. Eaton*, 11 Mass. 368, and 13 Mass. 371; *Atwood v. Fisk*, 101 Mass. 363; *Bryant v. Peck & Whipple Co.*, 154 Mass. 460; *Williams v. Bayley*, L. R. 1 H. L. 200; *Jones v. Merionethshire Society*, 1892, 1 Ch. 173, 182, 185, 187.

In the case at bar, the contract by which the plaintiff conveyed its railroad and franchise to the defendant for a term of nine hundred and ninety-nine years was beyond the defendant's corporate powers, and therefore unlawful and void, of which the plaintiff was bound to take notice. The plaintiff stood in the position of alienating the powers which it had received from the State, and the duties which it owed to the public, to another corporation, which it knew had no lawful capacity to exercise those powers or to perform those duties. If, as the plaintiff contends, the contract was also beyond its own corporate powers, it is certainly in no better position. In either aspect of the case, the plaintiff was *in pari delicto* with the defendant. The invalidity of the contract, in view of the laws of which both parties were bound to take notice, was apparent on its face. The contract has been fully executed on the part of the plaintiff by the actual transfer of its railroad and franchise to the defendant; and the defendant has held the property, and paid the stipulated consideration from time to time, for seventeen years, and has taken no steps to rescind or repudiate the contract.

Upon this state of facts, for the reasons above stated, the plaintiff, considered as a party to the unlawful contract, has no right to invoke the assistance of a court of equity to set it aside. And so far as the plaintiff corporation can be considered as representing the stockholders and seeking to protect their interests, it and they are barred by laches. *Harwood v. Railroad Co.*, 17 Wall. 78; *Graham v. Birkenhead &c. Railway*, 2 Hall & Twells, 450; *S. C. 2 Macn. & Gord.* 146; *Ffooks v. Southwestern Railway*, 1 Sm. & Gif. 142, 164; *Gregory v. Patchett*, 11 Law Times (N. S.) 357.

This case is not like those in which the defendant, having abandoned or refused to perform the unlawful contract, has been held liable to the plaintiff, as upon an implied contract, for the

value of what it had received from him and had no right to retain. *Spring Co. v. Knowlton*, 103 U. S. 49; *Logan County Bank v. Townsend*, 139 U. S. 67, and cases there cited.

But the case is one in which, in the words of Miller, J., in a case often cited in this opinion, the court will not disturb the possession of the property that has passed under the contract, but will refuse to interfere as the matter stands. *Pennsylvania Railroad v. St. Louis, Alton & Terre Haute Railroad*, 118 U. S. 290, 316, 317. See also *Union Trust Co. v. Illinois Midland Co.*, 117 U. S. 434, 468, 469; *Central Transportation Co. v. Pullman's Car Co.*, 139 U. S. 24, 56, 57, 61.

Decree affirmed.

GILES H. BOYD, APPELLANT, *v.* THE AMERICAN CARBON BLACK COMPANY *et al.*

IN THE SUPREME COURT OF PENNSYLVANIA, JULY 15, 1897.

[*Reported in 182 Pennsylvania State Reports 206.*]

APPEAL, No. 51, Jan. T., 1897, by plaintiff, from decree of C. P. McKean Co., Dec. T., 1896, No. 1, dismissing bill in equity. Before STERRETT, C. J., GREEN, McCOLLUM, MITCHELL and DEAN, JJ. Reversed.

Bill in equity for an accounting of partnership transactions. Before MORRISON, J.

The three contracts marked exhibits A, B, C, which are decreed to be delivered up by the defendants for cancellation, are described in their proper order in the opinion of the Supreme Court, where will also be found a full statement of the facts.

The court below sustained a demurrer to the bill.

Error assigned was in sustaining demurrer.

Eugene Mullin, with him *T. F. Mullin*, *J. P. Mullin*, and *E. W. Mullin*, for appellant.

Geo. A. Berry, of *Berry & Edgett*, for appellees.

Opinion by DEAN, J.

By an agreement of June 18, 1891, Giles H. Boyd, the appellant, formed a partnership with the appellee, the American Carbon Black Company. Boyd was to furnish gas to the company from his lands in Sargent township, McKean County, for the manufacture of carbon gas black, at one-half cent per pound of all black manufactured at works to be erected by the company, he to have an option to acquire one-fifth interest in the company

on paying one-fifth the cost of constructing and operating the plant; this interest he afterwards took. By a subsequent agreement, dated February 13, 1892, he stipulated not to sell gas to any other person or company for the manufacture of carbon black, gas black, or lamp black, from the same premises; in consideration of this the company released him from the obligation of drilling more wells, which he had assumed under the first agreement.

On March 11, 1892, the Carbon Black Company, theretofore only an association of individuals, was duly incorporated for the purpose of manufacturing "carbon black," etc., and Boyd subscribed and paid for fifty shares of the capital stock of the par value of \$100 per share, and then he was duly elected a director. The corporation, by the name of the American Carbon Black Company, succeeded to all the rights of the partnership under the two agreements. On April 5, 1893, another agreement was entered into between Boyd and the corporation, by which it was stipulated that the parties to the agreement would erect another factory of a daily capacity of thirty barrels, at Gallagher, Pa., the expense to be borne equally by Boyd and the corporation; the corporation agreeing to manufacture carbon black from surplus gas from Boyd's lands, market it and divide the profits equally with Boyd; they to jointly drill gas wells. Accordingly, a factory of thirty barrels' daily capacity was erected and put in operation. But in December, 1895, the corporation partly stopped operations at the second plant, and in June following suspended altogether at that point; neither would it permit Boyd to operate it; in the meantime, adjoining owners drilled wells, and are draining the gas underneath Boyd's lands. After stopping operations at Gallagher the corporation entered into an agreement with the Columbian Black Company, another corporation, to sell to the Columbian all the black it manufactured at four cents per pound, and that the two corporations should divide profits and losses, after deducting three-fourths of a cent per pound for expenses and losses; and that the American Carbon Black Company should close down its factories for one year from January 1, 1896, and would manufacture, when running, to only one-half its capacity, on notice at any time from the Columbian.

On October 5, 1896, Boyd filed a bill in equity against the American Carbon Black Company and its officers, praying, on the facts as we have in substance stated them:

1. That the several agreements between him and the company, and the one between the two companies, be declared void, and that they be ordered to deliver them up for cancellation.
2. That an account be taken of all the rents, royalties and

profits properly due plaintiff, as well as his proportionate share of the money improperly paid to the Columbian Company.

3. That the partnership between him and defendant be declared dissolved, and an account be taken.

4. That a receiver be appointed to take charge of the partnership property, books and business.

5. That defendants be decreed to pay whatever balance was found due.

6. That defendants be restrained by injunction from taking gas from plaintiff's land.

7. General relief.

The defendants filed a general demurrer to the jurisdiction, and further demurred specifically, on the grounds:

1. That plaintiff had an adequate remedy at law for all his alleged complaints.

2. That no such partnership as averred by him could be lawfully entered into by a corporation; therefore, equity would not take jurisdiction, either to decree dissolution, an account, or the appointment of a receiver.

The court below, after argument, sustained the demurrer and dismissed the bill. From that decree we have this appeal.

Of course, the demurrer admits the truth of the averments in plaintiff's bill. We have, then, the facts that the contracts of partnership were made by the plaintiff with the corporation of which he was a stockholder and director and a gross violation by defendants, not only of the contract of partnership, but of the contracts made with him for the purchase of gas from his premises by the partnership. The principal reason given by the learned judge of the court below for sustaining the demurrer is that the contract of partnership by the corporation was *ultra vires*; that no corporation has authority to share its corporate management with natural persons, in a partnership. And for this ample authority is cited, and the rule cannot be questioned. But, conceding the full force of this rule, does it deprive the plaintiff, on the facts, of all remedy in equity? Assume that the partnership has not now and never had a legal existence; that is only because one of the partners had no power to enter into it; but, while it had no legal existence, it had one in fact; and the other partner fully performed; the corporation had the full benefit of the contract up to the time it concluded that it was more profitable to violate its agreements. Beach on Corporations, sec. 842, says: "It may be considered *prima facie ultra vires* for an incorporated company to enter into a partnership with other persons;" but, all the authorities hold that, notwithstanding the *prima facies*, if it be shown that the other part-

ner had fully performed his obligations under the contract, this plea will not avail. "A corporation may not avail itself of the defense *ultra vires* when the contract has been in good faith fully performed by the other party, and it has had the full benefit of the performance and of the contract." 27 Am. & Eng. Ency. of Law, 363; Morawetz on Corporations, sec. 689; Wright v. Pipe Line Co., 101 Pa. 204; R. R. Co. v. Transportation Co., 83 Pa. 160.

Taking, as we must, every material averment of plaintiff's bill as an admitted fact, the defense, if it should prevail, would work a palpable injustice. While public policy demands that the courts should declare such contracts by corporations unlawful, and that they will make no decree which prolongs their life, in fact, for a single day, every principle of equity commands that the corporation receiving a benefit from such contract shall account for what it has received from him who has fully performed. The contract is not *malum in se*, but only *malum prohibitum*; it was illegal, but not iniquitous. If the corporation has had the benefit of \$15,000 paid by Boyd for the construction of the second plant; has received the proceeds of the manufactured product; has used and continues to use his gas, it ought to and must account. It is wholly immaterial whether the partnership be declared dissolved because it is illegal to carry it on, or it be declared at an end in fact, because of want of power on part of the corporation to enter it; in either case the plaintiff is entitled to his property in possession of defendants, and whatever money they have received more than their share. As they allege that the contracts with plaintiff were illegal, they can claim no rights of possession of the whole partnership assets and plaintiff's property under them, and must deliver them up to be cancelled. As to the agreement with the Columbian Company, the court below properly held that, as that company was not a party to this suit, no decree affecting it could be made. In so far as the American Carbon Black Company has made contracts with other parties injurious to its stockholders, such contracts are not involved in this issue. Plaintiff's plea, here, is as an individual member of an alleged partnership, and our decree is on that issue alone. While the fact that he was a stockholder and director in the corporation confers no authority on the corporation to defraud him in partnership transactions with itself, neither does that fact confer on him authority in this issue to assert his rights as a stockholder.

It is possible, in the averments in the bill, plaintiff might have sustained an action at law, but at best, that form of remedy would have been cumbersome and inconvenient, and

therefore would not have been adequate: Electric Company's Appeal, 114 Pa. 574.

It is, therefore, directed that the decree of the court below sustaining the demurrer and dismissing the bill be reversed, and that plaintiff's bill be reinstated and taken *pro confesso*. Further: That the partnership, which was in fact entered into and carried on between plaintiff and defendants under the three several agreements marked exhibits A, B and C, be declared at an end, and that said contracts be surrendered by defendants for cancellation; that an account be taken of all the rents, royalties, income and profits due plaintiff from said defendants, according to said contracts; that all the business of said partnership in fact be wound up, and all the assets of the same be turned into cash, and an account be then stated between the parties, and distribution of the cash be made as in and by the said contracts the parties have a right to demand, and that proper decrees for enforcing payment according to said distribution be made on the parties by the court below. It is further directed that under the equity rules a receiver be appointed by the court below, to take into his possession the in fact partnership property, books and accounts, to the end that a settlement may be had of its business; and that such further and other decree or decrees be entered by the court below as will promote equity between the parties, in accordance with this opinion.

It is further ordered that appellee pay the costs of this appeal.

THE NASSAU BANK, APPELLANT, *v.* JOHN J. JONES *et al.*,
EXECUTORS, ETC., RESPONDENTS.

IN THE COURT OF APPEALS OF NEW YORK, FEBRUARY 26, 1884.

[Reported in 95 *New York Reports* 115.]

APPEAL from judgment of the General Term of the Superior Court of the city of New York, entered upon an order made April 9, 1883, which affirmed a judgment in favor of defendants, entered upon a decision of the court on trial at Special Term. (Reported below, 17 J. & S. 498.)

This action was brought against defendants as executors of the will of Daniel Jones to compel them to transfer and deliver to plaintiff fifty \$1,000 bonds and one hundred and twenty-five shares of the stock of the Denver and Rio Grande Railroad Company, or to account for and pay over the value thereof and all interest and dividends received by their testator thereon.

The material facts are stated in the opinion.

Samuel Hand for appellant.

Martin J. Keogh for respondents.

RUGER, Ch. J. The question involved in this case, as we regard it, is the right of a banking corporation chartered under the laws of this state to subscribe for the stock of a railroad corporation.

In the spring of 1879 the Denver and Rio Grande Railroad Company, being a corporation organized to construct railroads in Colorado and adjoining territories, with the view of raising money to extend its lines, published a circular whereby it proposed in substance to issue \$5,000,000 of its bonds, in sums of \$1,000 each, payable thirty years after date, with annual interest at seven per cent. in gold, secured by mortgage upon its property; and to deliver one of such bonds, together with five shares of its capital stock of the par value of \$100 per share, to each and every person who should advance thereon the sum of \$900, reserving, however, the privilege to the railroad company of withdrawing the proposition when it should have received subscriptions to said loan to the amount of \$3,000,000. This proposal was favorably received, and the loan was subscribed for by citizens and corporations in various States of the Union, to an amount greatly exceeding the sum required by the railroad company. Among others the defendants' testator, one David Jones, subscribed for and was awarded \$90,000 of such contemplated loan. It is claimed by the appellant, and was found as a fact by the trial court, that Jones undertook, by the authority and for the benefit of the plaintiff, to contract with this railroad company for a loan under its proposal, in the name of the plaintiff, to the extent of one-half of the amount which should be allotted to him; and by this action the appellant seeks to recover from Jones' executors, among other things, the profits claimed to have been made by him upon its share of the transaction. The right to maintain the action seems to depend upon the power of the bank to enter into the proposed contract, for if it had no lawful authority to make such a contract it could not become liable to Jones upon its obligation to take and pay for the property contracted for; and consequently there would be no consideration for Jones' undertaking to subscribe for the benefit of the bank. Not only this, but the bank could not, by suit, enforce against any one an executory contract which it was unauthorized by its charter to make.

It becomes necessary, therefore, to inquire into the nature of the proposed contract, and the legal capacity of the plaintiff to transact business.

The proposition of the railroad company contemplated either

a loan of money or a sale of its stock and bonds; and the view we take of the case does not render it material to determine which construction should be given. By whatever name it be called, the transaction contemplated that its subscribers should become the legal owners of the certain stock and bonds thereby offered to be disposed of.

If it be regarded as a loan, the subscriber would receive the bonds with their mortgage security, as an evidence of the company's indebtedness to him; and the stock as a bonus to induce the making of the loan. On the other hand, if it be considered as a purchase of the stock and securities of the railroad corporation, the subscriber becomes the owner of such stock and bonds upon complying with the conditions of the proposition.

In either event he becomes the absolute owner of the property proposed to be delivered in exchange for the money advanced, and acquires all the rights and privileges, and subjects himself to all the liabilities of such proprietorship.

The acquisition by the railroad of a new class of stockholders was as much a part of the scheme as the creation of a debt; and its proposition to loan money could not be availed of, under the terms of the offer, without necessarily involving an acceptance of the privileges and incurring the liabilities of a stockholder. The offer of this stock was a material part of the proposition, and was undoubtedly largely relied upon as an inducement to investors. The increase of creditors and stockholders would proceed *pari passu*, under this scheme; and the subscribers to the loan might, in case of the company's insolvency, eventually, as the owners of its stock, be compelled to contribute to the payment of its debts.

It is clear that a banking corporation cannot enter into a contract of this character, unless it has authority under its charter to become a subscriber for the stock of railroad corporations, and thereby assume the obligations to which stockholders are subject by statute. *Adderly v. Storm*, 6 Hill, 624.

It is scarcely conceivable that it can be seriously urged that a moneyed corporation, having under its charter the right to transact a banking business only, may legally engage, as a corporation, in the construction of railroads, or in furnishing money for such an object, in exchange for the stock of a railroad corporation, and yet when this case is analyzed and stripped of its irrelevant details and circumstances we cannot see why this is not precisely what was attempted by the plaintiff.

This action is brought upon the theory that Jones was, in making the subscription in question, the agent of the plaintiff, and it thereby seeks to charge the defendants, as Jones' execu-

tors, with a trusteeship for its benefit, of a large quantity of the stock of the railroad corporation, for which it asks the defendants to account to it, as the owners thereof.

The complaint assumes that the plaintiff, in 1879, became the equitable owner of a large amount of such stock, acquired by virtue of an original subscription therefor made with the company issuing the stock; and that it has ever since been the equitable owner, and is now entitled to demand the immediate delivery and possession of such stock.

Assuming the validity of the contract relied upon by the plaintiff, it has been for several years a stockholder in the railroad company, and has thereby become answerable as such stockholder, for a moiety at least, of any sum which Jones might be required to pay through any statutory liability for the debts of the corporation. *Stover v. Flack*, 30 N. Y. 64.

Even a cursory view of the provisions of the statute under which the plaintiff was organized, and the cases giving construction to the powers thereby conferred, renders it quite clear that the contract under which the plaintiff claims was not only *ultra vires*, but contrary to public policy.

The plaintiff is a moneyed corporation, organized under chapter 260 of the Laws of 1838, and authorized by that statute to "carry on the business of banking, by discounting bills, notes, and other evidences of debt; by receiving deposits; by buying and selling gold and silver bullion, foreign coins and bills of exchange, and by loaning money on real and personal property."

The legislature intended by the act in question to inaugurate in this State an entirely new system of banking, and thereby undertook to provide for the establishment of moneyed corporations which should furnish to the public a safe and reliable circulating medium for the transaction of its business, and secure and solvent depositaries for the custody of such moneys as were needed for current use by the business public. *Schermerhorn v. Talman*, 14 N. Y. 117; *Leavitt v. Blatchford*, 17 *id.* 526. The solvency of these institutions was guarded by special provisions and limitations in the act authorizing their incorporation, and has ever since been the object of sedulous care, both on the part of the legislature and of the courts. Chap. 360, Laws of 1837; chap. 329, Laws of 1854; chap. 62, Laws of 1862. The language employed in the act defines their power and duties, and excludes by necessary implication a capacity to carry on any other business than that of banking, and the adoption of any other methods for the prosecution of such business than those specially pointed out by the statute. *Pratt v. Short*, 79 N. Y. 440; *Morse on Banking*, 5; *Talmage v. Pell*, 7 N. Y. 347; *People v. Utica Ins.*

Co., 15 Johns. 383. In the latter case banking powers were defined, generally, as the right to issue bills, negotiate notes and receive deposits; and in *Pratt v. Short*, *supra*, Andrews, J., describes the principal functions of a banking corporation to be to "issue notes to circulate as money, and discounting commercial paper." The business of banking, as defined by Webster, "is the establishing of a common fund for lending money, discounting notes, issuing bills, receiving deposits, collecting the money on notes deposited, negotiating bills of exchange," etc. The implied restrictions upon the corporations formed under the act of 1838 against transacting any other business than that of banking, and the careful definition given to that word not only by lexicographers but in the reported cases, would seem clearly to establish a want of authority in such corporation to engage in any business transactions excepting such as relate to the collection of business paper, the buying and selling of coin and exchanges, and the loaning of moneys upon the securities pointed out by the statute. Certainly, the utmost liberality in the construction of the powers given to these corporations would not include the rights claimed for them in this case. The character and quality of the securities in which they are authorized to employ their moneys, and the nature of the business in which they are privileged to engage, have frequently been the subject of discussion in our courts, with the same uniform tendency to so interpret the law as to limit their business operations, and confine their loans and investments to such transactions as should best promote their security and solvency. *Crocker v. Whitney*, 71 N. Y. 161; *Schermerhorn v. Tallman*, *supra*. The spirit of the law, as well as a sound public policy, forbid these institutions from risking the moneys intrusted to their care in doubtful speculations or enterprises.

The great change made in the financial business of the country by the establishment of the National banking system has not altered the policy of the law regarding the institutions organized under the State system of banking, although it has much restricted the number of corporations subject to its application.

The protection of the public from the disastrous consequences which are to be apprehended from an unsound banking system is just as necessary now as formerly, and requires the application of the same principles that distinguished our jurisprudence when the State banks were the exclusive agents in our financial system.

For these reasons, we are of the opinion that the plaintiff was not only precluded by public policy, but was not authorized by the statute under which it was organized to enter into any engagement as a stockholder in a railroad corporation.

The contract between the plaintiff and Jones was wholly executory, and nothing has occurred thereunder preventing the bank from setting up its own want of authority to make such a contract as a defense to any action brought thereon by Jones.

While executed contracts made by corporations in excess of their legal powers have, in some cases, been upheld by the courts, and parties have been precluded from setting up as a defense to actions brought by corporations their want of power to enter into such contracts (*Bissell v. M. S. & N. I. R. R. Co.*, 22 N. Y. 258; *Whitney Arms Co. v. Barlow*, 63 id. 62; *Woodruff v. E. R. Co.*, 93 id. 618), this doctrine has never been applied to a mere executory contract which is sought to be made the foundation of an action, either by or against such corporations. It was said by Selden, J., in *Tracy v. Talmage*, 14 N. Y. 179: "That a contract by a corporation, which it has no legal capacity to make, is void and cannot be enforced, it would seem difficult to deny." In *White v. Buss*, 3 Cushing, 448, Shaw, Ch. J., lays down the rule as follows: "It is well settled by the authorities that any promise, contract or undertaking, the performance of which would tend to promote, advance or carry into effect an object or purpose which is unlawful, is in itself void and will not maintain an action."

Lord Mansfield, in *Smith v. Bromley*, Douglas, 696, says: "If the act is in itself immoral, or a violation of the general laws of public policy, then the party paying shall not have this action." In *Tracy v. Talmage*, *supra*, 217, Comstock, J., says: "It is admitted that the contract of a corporation, which it has no legal capacity to make, cannot in its terms be enforced."

There is nothing in this case to exempt the plaintiff from the operation of the general principle determined in the cases referred to.

Jones owed no duty to the plaintiff, except that which sprang out of his engagement to purchase the stock and bonds in question; and that having failed on account of its illegality, left no enforceable obligation resting upon him. *Levy v. Brush*, 45 N. Y. 589. There is no pretext for the claim that the contract was in any respect an executed one, for Jones never even entered upon its performance. His subscription for the loan in his own name was in direct violation of the obligation which it is claimed that he had assumed; and it is that obligation alone which is sought to be enforced in this action. The bank, by the transaction in question, secured Jones' promise to do certain things, and has relied solely upon that promise. It has done nothing in performance of the contract, and, so far as it is concerned, the contract remains wholly executory.

Neither can Jones be treated as a trustee for the benefit of the plaintiff; a trust whereby it is attempted to accomplish an illegal purpose is quite as objectionable as a direct contract to effect the same object.

The law does not raise an implied obligation to effectuate a purpose which is forbidden, and which cannot be effected by the parties through the agency of an express contract. Perry on Trusts, sec. 214.

The claim here is that a trust should be implied to enable the plaintiff to reap the profits from a transaction in which it was not authorized by law to engage. We have found no authority which supports such a claim, and are unable to discover any ground upon which this action can be maintained.

It follows that the judgment should be affirmed.

All concur, except RAPALLO and EARL, JJ., dissenting.

Judgment affirmed.

THE CAMDEN & ATLANTIC RAILROAD CO. *v.* THE
MAYS LANDING & EGG HARBOR CITY
RAILROAD CO.

IN THE COURT OF ERRORS AND APPEALS OF NEW JERSEY, JUNE
TERM, 1886.

[*Reported in 48 New Jersey Law Reports 530.*]

ON error to Supreme Court.

Peter L. Voorhees for the plaintiff in error.

Samuel H. Grey for the defendant in error.

Wayne MacVeagh, of Pennsylvania, for the plaintiff in error, in reply.

VAN SYCKEL, J. This was an action of debt brought in the Supreme Court to recover the rent alleged to be due from February, 1881, to June 1, 1882, on a lease of its road executed in 1873 by the defendant in error to the plaintiff in error for the term of nine hundred and ninety-nine years. The Mays Landing & Egg Harbor road was built under a charter obtained in 1871, and since its completion in 1872 it has been in the possession of the Camden & Atlantic Company as lessee until February, 1881, at which time the latter company ceased to operate it, and refused to recognize the validity of the lease.

The defense to the action is rested upon the want of power in the lessee company to execute the lease.

The Camden & Atlantic Railroad was completed from Camden

to Atlantic City in the early part of 1862 under a charter granted in 1852. This road I will hereafter, for brevity, style the main line, and the Mays Landing & Egg Harbor road, the branch road.

The branch road rests its own authority to make a lease, and the authority of the main line to accept a lease, upon the seventeenth section of the charter of the branch, which provides that the said branch road is authorized to lease its railroad to or consolidate with any other railroad company, which is thereby authorized to take such lease and operate the same for such time or times, and on such terms, as the said parties may agree upon.¹

So far as the grant of authority to the main line is concerned, the seventeenth section is unconstitutional. The necessary power to the main line, if it exists, must be sought for in its own charter.¹

It must, therefore, be conceded that the execution of the lease on the part of the Camden & Atlantic road was *ultra vires*.

The rule is well settled, both in England and in this country, that an executory contract, *ultra vires*, cannot be validated by the acquiescence of every stockholder of the company. It is also generally conceded that an *ultra vires* contract fully executed cannot be receded from. Field on Corp., §§ 263, 264; Green's Brice's *Ultra Vires*, 371, 372, 373; 1 Wood on Railroads, §§ 171, 172, 173; Thomas *v.* Railroad Co., 101 U. S. 71.

The courts have differed upon the question whether the plea of *ultra vires* is available by a corporation in an action brought against it for not performing its side of the contract where the transaction is complete and nothing remains to be done by the party seeking relief.²

In the conflict of judicial decision on this subject this court may adopt and should adopt the rule which will produce the best results in the administration of justice. In my judgment the true rule is that when the transaction is complete, and the party seeking relief has performed on his part, the plea of *ultra vires* by the corporation which has acquiesced in it is inadmissible in an action brought against it for not performing its side of the contract in all those instances where the party who has performed cannot, upon rescission, be restored to his former status.

In the cases maintaining the contrary doctrine the reasoning of the courts has been :

1. That corporators might, by ratifying corporate acts by their acquiescence, indefinitely extend and amplify their granted powers.
2. That consent on the part of those who do an act which they have no power to do cannot make it legal.

¹ The consideration of this question has been omitted.—Ed.

² The citations and discussion of cases have been omitted.—Ed.

3. That to hold that an act performed in executing a void contract makes all its parts valid is to say that the more that is done under an authorized contract the stronger is the claim to its enforcement by the courts.

To the first objection a sufficient answer is that the State may interpose its authority at any time and compel an abandonment of the act in excess of power and, if need be, revoke the charter of the company for its usurpation.

When the State challenges the legality of the transaction, the paramount and only question is whether it has bestowed upon the company the requisite authority to engage in it. When the question arises between the company and the other party to the contract, other legal principles apply in determining whether the contract shall be observed. It will be admitted that where there is an absence of authority on the part of a corporation to do an act, the requisite power cannot be imported into the transaction, either by the consent of stockholders or by the execution of the contract by the other party to the agreement. The contract must necessarily continue to be *ultra vires*. No such effect has been attributed in any of the cases to acquiescence or unilateral performance. The basis upon which the enforcement of the contract in such cases rests is that the company is estopped from setting up its own unauthorized act, and its own incapacity, to evade performance on its part, after receiving the fruits of the bargain. The power of the company is not amplified, the agreement is none the more legal, in the sense that there was authority to execute it; the court simply refuses to entertain the defense, which common honesty forbids the company to make. A man may become bound by the act of an unauthorized agent, and be held liable to the contract made for him, not on the ground that the agent in fact had any authority, but for some conduct on the part of the alleged principal which precludes him from raising the question of authority.

No reason is perceived why the rules of fair dealing, which are so rigorously applied to natural persons, shall not pertain as strictly to private corporations. No instance is known where a natural person can set up in his own behalf, and for his own advantage, his want of authority to do an act for which he has received the consideration from the other party. Transactions which are immoral, illegal, forbidden by statute, or contrary to public policy, are not embraced in this discussion; they cannot furnish the basis for a legal cause of action.

Why is it that *extra vires* contracts are recognized as unassailable, and are permitted to stand as the foundation of rights acquired under them, after they have been executed on both sides? Such execution imparts no additional power to the corporate body.

It does not transmute the negative into the positive. The absence of power is as apparent after as before performance. Why is it that corporations are compelled to pay money borrowed in excess of authority, and to pay the stipulated rent for premises unlawfully leased, for the period of occupation?

The law does not imply a contract to pay the bondholders the money thus received. It is illogical to say that the law will imply a contract by the company which it has no power to make for itself. A contract cannot be implied where an express contract cannot be made. The law recognizes the obligation; it precludes or estops the attempt to evade it. Apply to it what legal phrase you may, the underlying principle is that the corporation cannot set up its own infirmity when it is unconscionable to do so. The law forbids the defense on account of the flagrant injustice which would otherwise be done. The question of corporate power is not entertained.

To enable recompense to be had to this extent, the contracts are respected, not that they rest in authority, but because good conscience requires it.

How then can recognition of the estoppel be denied where the contract has been executed on the one side, and the party performing cannot, upon rescission, be restored to his former status?

Why should the corporate body be permitted to plead its own wrongful act, and set up its own infirmity as a bar to the recovery by the other party of what it should in right and justice be accorded?

It is true that a person cannot, by his own act, acquire a right against another; the other must, in some way, bind himself. The acquiescence in the contract, in virtue of which the other party performs, and the acceptance of its benefits, constitute the binding acts, and raise the estoppel. I am unable to see how, upon a just conception of the legal principles involved, a different rule can be applied where the corporation has acquiesced in the contract, and the other party, by performance on his part, has been led into a position from which he cannot be extricated.

Misconception arises from failing to distinguish between those rights which parties acquire as between themselves, and the rule by which corporate authority must be measured and limited when the State interposes to assert its prerogative.

Nor does the liability of the company rest upon the doctrine of ratification.

In its ordinary legal acceptance ratification applies to such contracts as a party has authority to make. Repeated affirmations of a contract by one who has no authority to enter into it, cannot supply the requisite authority.

But acquiescence in it, upon which the other party acts, may, and does, upon settled legal principles, preclude the parties from starting the question of power as between themselves. There is, in fact, a subsisting contract, actually executed in due and legal form, which, under the rule stated, is unimpeachable, except at the instance of the State. It is thus, in legal contemplation, impressed with the vigor and incidents of a valid contract as between the parties, and there is no difficulty in enforcing it in a suit at law.

It is like the case of one who makes, in legal form, a conveyance of real estate which he has no power to convey, and not like the case where the true owner fails to do some act which may operate as an equitable estoppel to his setting up his title against the person who has been misled by his conduct. In the former case the grantee could maintain an action at law against the grantor to recover possession of the premises granted. In the latter case the relief must be sought in a court of equity.

But whether the rule which I have formulated shall be applied to this case or not, the judgment below should, in my opinion, be affirmed, upon the ground that the lease in this case must be regarded as substantially a contract as fully executed on both sides as those unauthorized contracts in which money has been loaned to or work done for a corporation, for which it has issued its bonds to the creditor.

The agreement was entered into November 3d, 1871, between the Camden & Atlantic Railroad Co. and the Mays Landing & Egg Harbor City Railroad Co., in and by which it was agreed that if the latter company would construct the branch road in a specified manner, on or before the 1st day of July, 1872, the former company would guarantee the bonds of the latter company to the amount of \$37,500, to be used in the construction of the said road, and take a lease for the same, when completed, for nine hundred and ninety-nine years at a specified rental.

In pursuance of this agreement the bonds were issued by the branch road, and guaranteed by the main line. The road was built under the direction of the main line, and the lease executed.

Every term of this agreement on both sides has been fulfilled, and the agreement, in all respects, substantially executed.

The annual report of the directors of the main line to the stockholders for the year ending December 31st, 1871, recited the terms of this agreement in detail.

Annually thereafter, until 1879, the existence of the lease and the income and disbursements incident to the operation of the branch were duly reported to the stockholders of the main line, during all which time no attempt was made to avoid the lease.

We must impute to the stockholders of the main line utter neg-

lect of their affairs, if we say that they did not have notice of the agreement to build the branch road, and of the lease executed in pursuance thereof.

The only reasonable inference from the circumstances proven is that they had knowledge of the transaction, and that it was engaged in and consummated with their approval and acquiescence. This case presents all the features which have led the judicial mind, in the cases cited, to establish the distinction between executory and executed contracts, in which respect it essentially differs from the Thomas case, in 101 U. S. This was not, as in the case in the Federal court, the mere leasing of a road owned by the lessor, where the repudiation of its terms would restore both parties to their former status.

Here the lessor built the road, not for itself, but at the instance of and for the lessee, with the proceeds of bonds guaranteed by the lessee to promote and effect the scheme. The branch road was a mere instrument in the hands of the main line to consummate the undertaking.

By the clearly expressed contract of the parties the road was to be the road of the lessee, the lessor to have only the fixed rentals.

The lessor has fulfilled every term of its agreement, and put the lessee in possession of all that it stipulated for. Nothing remains on the part of the lessor to be done. We must look at the substance of things in applying legal principles. The lease for nine hundred and ninety-nine years is practically an absolute transfer of the road to the lessee, and the rental a mere mode of paying the lessor for the work done and money expended in constructing the road for the lessee, instead of paying a fixed principal sum. The case does not, in effect and substance, differ from what it would have been if the main line had employed the branch road to construct the branch at a stipulated price, and had issued its bonds in payment, after completion and acceptance of the work.

All the cases concede that under such circumstances the contract must be treated as executed.

If the contract had been to compensate the branch road for the work, by the bonds of the main line securing the payment of an annuity for nine hundred and ninety-nine years, and those bonds had been delivered, would it be asserted that it was, in substance, the less an executed agreement? It is the merest verbiage and form whether it is termed a lease securing a rental for nine hundred and ninety-nine years, or a bond securing an annuity for a like term.

The injustice and inadmissibility of permitting the main line to repudiate its bonds after it has been in occupancy of the road for more than seven years, because the road proved to be unprofitable,

would not be more glaring than the inequity of the defense interposed here to the payment of the rental. The work undertaken to be done was fully executed by the branch road, and the manner in which it is to be paid for is immaterial, so far as the principle involved is concerned. There is no consideration of justice and fair dealing, which, in the cases referred to, led to the rejection of the offer by the corporations to set up their own incapacity in avoidance of their just obligations, which is not most forcibly presented by this case. It cannot, in the application of legal principles, be disassociated from executed contracts without disregarding the reasons which lie at the foundation of the rule. If the lease is subject to the defense of *ultra vires*, the guarantee of the bonds is also incapable of enforcement, and thus loss will likewise fall upon those who advanced the money, upon the faith of the guaranty, to be used under the direction of the lessee, and for its purposes.

If such a doctrine is established, who can answer for the solvency of our insurance companies, savings banks and moneyed institutions?

It is a matter of common knowledge that corporate bodies, in many instances, through misconception of their powers, or otherwise, have exceeded the legal limits of their authority.

An action to enforce against the main line its guaranty of these bonds could not be classed with those cases in which companies have been required to return the money they had received on *ultra vires* contracts, or to pay rentals for the period of occupancy.

If the invalidity of the contract and the right to repudiate it be conceded, the law cannot raise an implied obligation on the ruins of the contract upon which to found a recovery. The liability of the defendant upon the bonds must rest, if it exists at all, upon the contract of guaranty.

The money was not paid to the main line, but to the obligor of the bonds, and no obligation can be implied on the part of the defendant to repay it. The validity of the guaranty contract must be affirmed, or no action can lie against the defendant.

In the destruction of the contract there must be an entire absence of legal liability.

The legal doctrine, which must be invoked to maintain an action by the bondholders on the guaranty, will support the judgment in this case.

The doctrine of estoppel by acquiescence, in cases which present the characteristics which appear here, can work no inequity, for it may safely be presumed that the parties to be affected by an engagement are competent to determine what will best promote their

own interest, and for any error in judgment they, and not others, should suffer.

The contrary doctrine, affording so easy an escape from the consequences of their acts, invites them to overstep the boundaries of their authority.

There can be no dissent from the assertion that good faith and honest dealing unite in forbidding that the defense here set up shall be successfully interposed. In my opinion, the law is against it, and the judgment below should be affirmed.

DIXON, J. I vote to affirm, upon the ground that the Camden & Atlantic Railroad Co. cannot set up that its own charter has become void under sec. 17, so long as it continues to exercise the powers granted by the charter, and that unless the charter is considered as avoided under sec. 17, the power to build the branch road continued when this lease was made, and consequently, according to *Branch v. Jessup*, 106 U. S. 468, the power to lease then existed.

What would be the result if some one besides the corporation itself were alleging the invalidity of the charter, need not now be considered.

For affirmance—THE CHANCELLOR, DIXON, MAGIE, REED, SCUDDER, VAN SYCKEL, BROWN, CLEMENT, COLE, MCGREGOR, WHITAKER.—II.

For reversal—DEPUE, KNAPP, PATERSON.—3.¹

MARBLE CO. v. HARVEY.

IN THE SUPREME COURT OF TENNESSEE, NOVEMBER 18, 1892.

[*Reported in 92 Tennessee Reports 115.*]

APPEAL from Chancery Court of Knox County, H. R. GIBSON, Ch.

Green & Shields for Marble Co.

W. C. Kain for Harvey.

LURTON, J. The complainant is an Ohio corporation, and was organized under the general incorporation law of that State "for the purpose of cutting, dressing, manufacturing, selling, and disposing of marble, stone, slate, granite, and other substances, with such other incidental and necessary powers essential to carry on said business." This company, with its place of business in Cincinnati, Ohio, has acquired the entire issue of shares made by a

¹ The dissenting opinion of Depue, J., has been omitted.—Ed.

Tennessee incorporation, engaged in a similar business and under a similar charter, and known as the "McMillin Marble Co." Its last acquisition of shares was under a contract with the defendant, who was president of the Tennessee company, and who owned, at the time of the sale, twenty-five shares, being one-half of the entire stock of the company. These shares he conveyed to a trustee, selected by the purchasing corporation, for its use and benefit. The consideration for the sale was the payment of six thousand dollars, the defendant assuming and agreeing to personally pay off and discharge one-half of all liability which might be fixed upon the McMillin Marble Co. as a result of certain suits against that company then pending in the courts of this State.

The bill alleges, and the evidence establishes, that the complainant company has been compelled, in order to protect the property of the McMillin Marble Co., to pay out about the sum of three thousand dollars in settlement and satisfaction of the claims in suit at time of its contract with defendant.

The relief sought is a decree against defendant for one-half this sum, being the proportion he agreed to pay under his agreement of sale. The defense is that the contract of sale to the complainant company was unlawful and void; that is to say, that the purchase of these shares was outside the objects of its creation as defined in its charter, and is therefore such a contract as is not only voidable, but wholly void and of no legal effect; that it is not a case of excessive use of a power granted, but that no power whatever was conferred to deal in or hold the shares of another corporation; that the suit is one upon a void contract and in furtherance of it, and that it should not be entertained by a court of law or equity.

"The rule in the United States," says Mr. Green, the American editor of Brice's *Ultra Vires*, "is that a corporation cannot become a stockholder in another corporation unless by power specifically granted by its charter or necessarily implied in it." Green's Brice's *Ultra Vires*, 91, note *b*, and American cases cited.

"A corporation has no implied right to purchase shares in another company for the purpose of controlling its management; nor may a corporation hold shares in another company as an investment, unless this be the usual method of carrying on its own proper business. A corporation must carry on its own business by its own agents, and not through the agency of another corporation. It is clear also that a corporation has no implied right to speculate in shares, unless this be the kind of business for which the company was formed." 1 Morawetz on Corporations, sec. 431.

The evidence shows that the declared purpose of complainant in buying in the shares held by the defendant was to enable it to

manage and control the business of the Tennessee company in the interest of the Ohio company.

There is no pretense that it had any express power to purchase shares in another company, and it is too clear to need argument or further citation of authority that it had no implied authority to purchase and hold shares, either in its own name or in that of a trustee, for the purpose of controlling another corporation. That these corporations were engaged in a similar business does not help the case. The purpose and intent in granting a charter is, that the corporation shall carry on its business through its own agents, and not through the agency of another corporation. The public policy of this State will not permit the control of one corporation by another. Especially is this true when a foreign corporation thus undertakes to control and swallow up a domestic company. Such control of one corporation by another in a like business is unlawful, as tending to monopoly.

The result is that this purchase of shares for the express object of controlling and managing another corporation was *ultra vires*, and, therefore, unlawful and void. Being void, it was of no legal effect, and no rights result from it enforceable by or through the courts of the State, when such aid is invoked in furtherance of the unlawful agreement.

But it has been insisted very earnestly by the able and learned counsel for complainant, that where the contract has been fully executed by the plaintiff, the defendant should not be permitted to invoke such defense to a suit brought to compel performance; that to permit such a defense would work injustice, and enable defendant to repudiate his liability while holding on to the price he has received. There are cases where, the contract being fully executed on both sides, the court, in the interest of justice, has refused to aid either in obtaining a rescission. *Whitney Arms Co. v. Barlow*, 63 N. Y. 62, is one of this class.

So there are cases where the defense of *ultra vires* has not been entertained when the defect was in the mode of executing the contract or in the power of the agent.

So there are many cases holding the party relying upon the defense of *ultra vires* to an accountability for the benefits received. Green's *Brice's Ultra Vires*, 171, and note at end of chapter.

Again, there are cases where the courts have refused to entertain suits to recover property from corporations which is held in excess of charter capacity. In such cases the courts have held that the defect in power could not be set up in a collateral way, and that the State only could complain of such violation. To this effect were our own cases of *Barrow v. Turnpike Co.*, 9 Hun, 303, and *Heiskell v. Chickasaw Lodge*, 87 Tenn. 668.

The question here is not like any of these. The complainant sues upon its contract, and, in affirmance of it, seeks to have the defendant perform an agreement which sprang from and was collateral to it. It has received the shares it purchased, and holds on to them. It simply asks that the defendant be further compelled to perform his contract by contributing, in accordance with his agreement, his proportion of the liability paid off by complainant in protection of the property of the McMillin Marble Co. The suit is clearly in furtherance of the original, unlawful, and void contract. That the contract has been executed by the plaintiff does not make it lawful or entitle it to an enforcement of it.

This proposition was very plainly put in *Pittsburg, etc., v. R. & H. Bridge Co.*, where it was stated, as a result of all the previous decisions of that court upon this subject, "That a contract made by a corporation, which is unlawful and void because beyond the scope of its corporate powers, does not, by being carried into effect, become lawful and valid; but the proper remedy of the party aggrieved is by disaffirming the contract, and suing to recover, as on a *quantum meruit*, the value of what the defendant has actually received." 131 U. S. 389.

The case of *Central Transportation Co. v. Pullman Car Co.* is an exceedingly interesting case, as it involved a consideration of the circumstances under which a defendant may interpose the defense of *ultra vires*, notwithstanding full performance by the plaintiff.

In that case, the Central Transportation Co. had leased and transferred all of its property of every kind to the defendant company, which was engaged in a similar and competitive business. The lessee company undertook to pay all of the debts of the lessor company, and to pay to it annually the sum of \$264,000 for a term of ninety-nine years. Possession was taken, and the installments paid for a number of years. The suit was for a part of the installment for the last year before suit. The defense of *ultra vires* was interposed and sustained, the court holding that the sale was unauthorized and in excess of the power of the selling company. It was urged for the plaintiff, as in this case, that, even if the contract was void, because *ultra vires* and against public policy, yet that, having been fully executed on the part of the plaintiff, and the benefits of it received by the defendant for the period covered by the declaration, the defendant was estopped to set up the invalidity of the contract as a defense to an action to recover the compensation agreed on for that period.

After reviewing its own decisions upon this branch of the case, that court said:

"The view which this court has taken of the question presented

by this branch of the case, and the only view which appears to us consistent with legal principles, is as follows: A contract of a corporation which is *ultra vires* in the proper sense—that is to say, outside the object of its creation as defined in the law of its organization, and therefore beyond the powers conferred upon it by the legislature—is not voidable only, but wholly void, and of no legal effect. The objection to the contract is not merely that the corporation ought not to have made it, but that it could not make it. The contract cannot be ratified by either party, because it could not have been authorized by either. No performance on either side can give the unlawful contract any validity, or be the foundation of any right of action upon it. When a corporation is acting within the general scope of the powers conferred upon it by the legislature, the corporation, as well as persons contracting with it, may be estopped to deny that it has complied with the legal formalities which are prerequisites to its existence or to its action, because such requisites might in fact have been complied with. But where the contract is beyond the powers conferred upon it by existing law, neither the corporation nor the other party to the contract can be estopped, by assenting to it or by acting upon it, to show that it was prohibited by law.

“A contract *ultra vires* being unlawful and void, not because it is in itself immoral, but because the corporation, by the law of its creation, is incapable of making it, the courts, while refusing to maintain any action upon the unlawful contract, have always striven to do justice between the parties, so far as it could be done consistently with adherence to law, by permitting property or money, parted with on the faith of the unlawful contract, to be recovered back, or compensation to be made for it. In such case, however, the action is not maintained upon the unlawful contract, nor according to its terms, but on an implied contract of the defendant to return, or, failing to do that, to make compensation for property or money which it has no right to retain. To maintain such an action is not to affirm, but to disaffirm, the unlawful contract.” 139 U. S. 60.

This seems to us to fully and clearly state the rule. The passage cited by counsel from *Railway Co. v. McCarthy*, 96 U. S. 267, “that the doctrine of *ultra vires*, when invoked for or against a corporation, should not be allowed to prevail when it would defeat the ends of justice, or work a legal wrong,” is misleading; and, if literally construed, would result in an enormous practical extension of the powers of corporations.

We do not understand that a result required by adherence to the law would be either unjust or a legal wrong. The learned judge doubtless intended it to be understood that the defense would be

a legal wrong only when the law did not require its consideration by the court.

This passage, and one of similar character in *San Antonio v. Mehaffy*, 96 U. S. 312, was uncalled for in the case in which it was used, and in *Central Transportation Co. v. Pullman Car Co.*, *supra*, was characterized as "a mere passing remark."

To sustain this suit, as now presented, would be in affirmance and furtherance of an unlawful and void contract. It is in no sense a suit in disaffirmance.

Whether complaint could tender back the shares received, and maintain a suit to recover the money paid for the shares upon an implied agreement to return money which the defendant had no right to retain, is a question not presented upon this record.

The decree dismissing the bill must, upon the grounds herein stated, be, and accordingly is, affirmed.

BATH GAS LIGHT CO. v. CLAFFY.

IN THE COURT OF APPEALS OF NEW YORK, DECEMBER 1, 1896.

[Reported in 151 *New York Reports* 24.]

APPEAL from a judgment of the General Term of the Supreme Court in the Second Judicial Department, entered December 13, 1893, which affirmed a judgment in favor of plaintiff entered upon a decision of the court on trial at circuit, a jury having been waived.

The nature of the action and the facts, so far as material, are stated in the opinions.

Abram J. Rose, L. Laflin Kellogg and Alfred C. Pettè for appellant.

James McKeen for respondent.

ANDREWS, Ch. J. A brief statement of the material facts will present the important question arising upon this appeal.

The plaintiff is a Maine corporation created under a special law of that State, passed in 1853, for the purpose of supplying gas for the lighting of the streets and buildings in the city of Bath. The United Gas, Fuel & Light Co. is also a Maine corporation, organized in 1888, under a general law, by the execution and filing of a certificate, which in pursuance of the law of Maine was first submitted to and approved by the Attorney-General, who certified that it was conformable to the Constitution and laws of that State. The certificate, among other things, specified that the corporation

was organized to "manufacture, lease, purchase and otherwise acquire, deal in, manage, use and sell any and all machinery, fixtures, appurtenances, appliances and plants for using and furnishing light, heat, and power, and for any and all purposes for which gas is now used." The plaintiff under its charter established a plant, and at the time of the execution of the lease now to be mentioned was engaged in supplying the streets and buildings in Bath with gas for lighting and other purposes. On November 10, 1888, it executed to the United Gas, Fuel & Light Co. a lease of its property and franchises for the term of twenty-five years from November 1, 1888, at an annual rent of \$2500, which the lessee covenanted to pay in semi-annual payments on the 1st day of May and the 1st day of November in each year, and also the taxes assessed during the term. Provision was made for the payment by the lessor to the lessee, at the expiration of the term, of the value of any improvements or extensions made by the lessee, and it was also provided that the lessee should give to the lessor a satisfactory bond for the faithful performance by the lessee of its covenants in the lease. In pursuance of the provision last mentioned, the United Gas, Fuel & Light Co., on the same day, executed a bond with the defendants, John Claffy and John T. Rowland, as sureties, conditioned for the faithful performance by the company of the covenants in its behalf contained in the lease, which bond was delivered to and accepted by the plaintiff. The sureties were interested in the United Gas, Fuel & Light Co. as stockholders, and Claffy (the appellant) was also a director. The lessee immediately, upon the execution of the lease, entered into possession of the demised property and paid the rent up to the 1st day of November, 1889, but defaulted in the semi-annual payment due May 1st, 1890, and on the 2d day of August, 1890 (the rent remaining unpaid), the plaintiff re-entered and took possession of the demised property under a provision of the lease which authorized the lessor to enter and expel the lessee on failing to pay rent. The entry also was, as may be inferred, with the consent and, indeed, at the suggestion of the officers of the lessee. This action was brought on the bond against the lessee and the sureties to recover as damages the rent which fell due May 1, 1890, and the proportionate rent from that date up to August 2d, 1890, and taxes which had been assessed against the property during its occupation by the lessee, which it had failed to pay.

The defendant Claffy alone appeared and defended the action. His sole defense to the general claim is that the lease was *ultra vires*, illegal and void, because (as is conceded) it was made without legislative sanction. If the court is compelled to accede to this contention by force of controlling authority, or from consid-

erations of public policy which overbear in the particular case the rules of ordinary justice, it will be our duty so to declare and to say that, although the United Gas, Fuel & Light Co. received and enjoyed the undisturbed possession of the demised property under the lease until the re-entry, and accepted and appropriated the benefit of the contract, nevertheless, when called upon to pay the rent which accrued during its occupation, it may defend itself on the ground that the plaintiff, in making the lease, exceeded its power and escaped the performance of its obligation, and, further, that the defendant Claffy may, for a like reason, avoid his guaranty.

The modern doctrine, as stated by Chancellor Kent, is to consider corporations as having such powers as are specifically granted by the act of incorporation, or as are necessary for the purpose of carrying into effect the powers expressly granted, and as not having any others. 2 Kent Comm. 299. This doctrine is embodied in the Revised Statutes of New York, and the section relating to the subject is regarded as simply declaratory of the antecedent law. 1 Rev. St. 600, § 3. It has been frequently stated that the validity of contracts or corporations is to be determined by comparing the contract made with the charter, and if upon such comparison it appears that the contract was neither expressly authorized, nor a necessary or reasonable incident to the exercise of the powers specifically granted, the contract is *ultra vires*. It seems that by the ancient common law a corporation could bind itself by a contract under its corporate seal, although the contract was not within the powers specified in the charter, and even although it contained negative words. This was in substance stated by Blackburn, J., in the case of *Riche v. Ashbury Railway Carriage Co.*, L. R. 9 Exch. 262, citing as authority *Sutton's Hospital Case*, 10 Co. 1. He said: "If there are conditions contained in the charter that the corporation shall not do particular things, and those things are nevertheless done, it gives ground for a proceeding by *sci. fa.* in the name of the Crown to repeal the letters patent creating the corporation. But if the Crown take no such steps it does not, as I conceive, lie in the mouth either of the corporation or of the person who has contracted with it to say that the contract into which they have entered was void as beyond the capacity of the corporation. The case came before the House of Lords on appeal from the decision of the Exchequer Chamber in favor of the plaintiff, and its judgment is reported in L. R. 7 Eng. & Ir. App. 653. The action was to enforce a contract entered into by the defendant, a corporation incorporated under the Companies Act of 1862. The judgment of the Exchequer Chamber was reversed on the ground that the contract sued upon was expressly prohibit-

ed by the act under which the defendant was incorporated, and was, therefore, void. The House of Lords applied the general doctrine that an act done in contravention of an express statute is utterly void.

The modern and reasonable doctrine that contracts into which corporations may lawfully enter are such only as are expressly or impliedly authorized by their charters, is nevertheless frequently disregarded in practice, and when this is done and a corporation enters into a contract beyond its chartered powers, the question arises which has been the subject of debate and of much difference of opinion, how shall such a contract be treated by the courts, and whether the contract can create any rights as between the parties which the courts will enforce. There are some propositions pertaining to the general subject which are beyond dispute. One is, that a contract by a corporation to do an immoral thing, or for any immoral purpose, or, to use a convenient expression, a contract *malum in se*, is void and gives no right of action. The doctrine, however, is not peculiar to contracts of corporations. It has its root in the universal principle that persons shall not stipulate for iniquity. Another principle of general recognition is that a corporation cannot enter into or bind itself by a contract which is expressly prohibited by its charter or by statute, and in the application of this principle it is immaterial that the contract, except for the prohibition, would be lawful. No one is permitted to justify an act which the legislature within its constitutional power has declared shall not be performed. The series of cases in this State, known as the Utica Insurance Cases, afford an apt illustration. It was held that the restraining acts which prohibited the exercise of banking powers, including the discount of paper, by other than banking corporations, rendered void securities taken on such discount by corporations not possessing banking powers, and this, although the object of the restraining laws seems to have been the protection of the chartered banks in the monopoly of banking.

But in not infrequent instances corporations enter into unauthorized contracts, which are neither *mala in se* nor *mala prohibita*, or when the only prohibition or restriction is implied from the grant of specific powers. It is this class of cases which open the field of controversy. Is such a contract performed by one party, but not performed by the other, void as between them to all intents and purposes, so that no recovery can be had under it against the party who has received the consideration for his promise, but neglects or refuses to perform it, or is it so tainted with illegality that the courts must refuse to recognize it under any circumstances or enforce its obligation, whether as to past or

future transactions? There are certain English cases which are relied upon by those who maintain the strict view that contracts of corporations *ultra vires* are under no circumstances enforceable in the courts. The principle of these cases are *The East Anglian Railways Co. v. The Eastern Counties Railway Co.*, 11 C. B. 775; *Macgregor v. The Dover & Deal Railway Co.*, 18 Ad. & El. 618, and *The Ashbury Railway Carriage Co., Limited, v. Riche*, L. R. 7 Eng. & Ir. App. 653. The *East Anglian* case seems to have been the first one in England which sustained a defense of *ultra vires* interposed by a corporation as a defense to an action at law on a contract made in the name of the corporation. See opinion of Erle, J., *Mayor of Norwich v. Norfolk Railway Co.*, 4 El. & Bl. 397. The defendant in that case, a railway corporation owning and operating a railway, entered into a contract with another railway company, by which it agreed to pay the Parliamentary expenses which might be incurred by the latter company in the effort to obtain authority to extend its lines, whether the grant should be obtained or not, the intention being to turn over the concessions, if obtained, together with the original line, to the defendant under a lease, for which a Parliamentary sanction was to be applied for. The concessions were only in part obtained, and no authority to make the proposed lease was given, and the project was finally abandoned. The action was brought on the contract to recover the expenses incurred by the plaintiff, amounting to more than twenty thousand pounds. It was held that the plaintiff was not entitled to recover, on the ground that the statute under which the defendant was incorporated prescribed that the funds of the defendant would be applied to the purposes for which it was incorporated, and that it could not legally enter into a contract involving the application of any portion of its funds to other purposes. The opinion relies upon cases in equity brought by shareholders to restrain the misapplication of corporate funds. The case of *Macgregor v. The Dover & Deal Railway*, and the case of *The Ashbury Railway Carriage Co.*, though differing in detail, were decided upon the same principle, but in the latter case there was an express statutory prohibition which was regarded as prohibiting the contract there in question. It is important to observe that in each of these cases the action was brought against the offending corporation, or those in privity with it, to enforce the unauthorized contract while it was still executory on the part of the corporation, and that the effect of a recovery would have been to divert and appropriate the funds of the corporation by the action of the courts to unauthorized objects, to the prejudice of the legal rights of stockholders and creditors. Without questioning these cases, it is quite apparent that they stand

in justice upon a very different basis from the action in this case, which is brought by the corporation to enforce a contract, the enforcement of which will indemnify the plaintiff and its stockholders for the deprivation of the use of the property of the corporation, during its possession by the defendants, under the unauthorized lease. The Supreme Court of the United States seems to be committed to a construction of the doctrine of *ultra vires* which would sustain the defense in the case now before us. Several cases have arisen in that court upon leases of railroads made without legislative sanction, in which it has been held that such leases are void as between the parties, and that no action can be maintained thereon to recover the rent reserved, even during the occupation by the lessee under the lease. In *Thomas v. Railroad Co.*, 101 U. S. 71, the defendant had leased to the plaintiffs a railroad for a term of years, reserving an option to terminate the lease at any time during the term, and the defendant, in case such option should be exercised, covenanted to submit to arbitration the ascertainment of the loss and damage to the plaintiffs by reason of such termination of the lease, and to abide by the award. The defendant exercised the option and terminated the lease and resumed possession of the road, and an action was brought for a breach of the contract in respect to arbitration. The trial court determined the case against the plaintiffs on the ground that the contract sued upon was in substance a lease of the property and franchises of the defendant, which, having been executed without legislative authority, was illegal and void, and the Supreme Court affirmed the judgment. The action, it will be observed, was in substance an action to recover the value of the unexpired term of which the plaintiffs had been deprived by the action of the defendant, and the covenant sued upon was wholly executory. But in the subsequent cases of *Pa. Railroad Co. et al. v. St. Louis, A. & T. H. R. R. Co.*, 118 U. S. 290; *Oregon Railway & Nav. Co. v. Oregonian Railway Co.*, 130 U. S. 1, and *St. Louis, V. & T. H. Railroad Co. v. Terre Haute & Indianapolis Railroad Co.*, 145 U. S. 393, which were actions by lessor against lessee to recover rent accrued under leases of railroads during the occupation by the lessees, it was broadly held that as the leases were made without legislative sanction they were void, and that no action could be maintained thereon to recover the past due rent, although the lessees were and still remained in undisturbed possession of the demised property. Miller, J., in the case in 118 U. S., expressed a doubt whether there could be a recovery on a *quantum meruit*. We concur with the opinion expressed by two of the learned justices of the court, who dissented from the judgment in the case last cited, that the decision carried the doctrine of *ultra vires* to an

unjust extent, and the rank injustice which, as it seems to us, these cases sanction justifies the observation of Lord St. Leonards in the case of *The Eastern Counties Railway Co. v. Hawkes*, 5 H. L. Cas. 347, 370, that "the safety of men in their daily contracts requires that the doctrine of *ultra vires* should be confined within narrow limits."

We concede that a railroad or other corporation invested with powers in the exercise of which the public have an interest, and empowered by reason of its *quasi*-public character to do acts and exercise privileges peculiar and exceptional to enable it to discharge its public duties, cannot, as against the public, abdicate its functions or absolve itself from the performance of such duties through an unauthorized transfer of its property and franchises to another body or corporation. We have so held in the case of *Abbott v. The Johnstown, etc., Railroad Co.*, 80 N. Y. 27, where it was decided that a railroad corporation which, without legal sanction, had leased its road, was not thereby exempted from liability as carrier to a passenger injured by negligence during the operation of the road under the lease.

There are obvious reasons of propriety and public policy, the prevention of monopolies, among others, aside from the mere question of capacity under their charters, which enforce the now well-settled doctrine that lease by such *quasi*-public corporations to be valid and effectual must be authorized by statute. But where, as in the present case, such an unauthorized lease has been made, and the lessee has received and enjoyed the possession of the property under the lease, is there any public policy which requires that the lessee should be permitted to escape the obligation imposed by the contract to pay the rent reserved during the enjoyment of the property? It is doubtless true, as has been suggested, that the corporation in such cases cannot, without the consent of the State, change its obligations to the State or the public, and discharge itself from its public duties. But the law affords ample remedy for the usurpation by corporations of unauthorized powers through proceedings by injunction or for the forfeiture of their charters. If a lease by a corporation, made in excess of its powers and without legislative sanction, is illegal in the ordinary and proper sense of the term, it may be properly conceded that no action could be maintained upon it. The lessee when sued for the rent could set up the illegality of the contract, and the defense would prevail, however inequitable the defense might be. But the term "illegal," which is frequently used to describe a contract made by a corporation in excess of its corporate powers, in most cases means simply that the contract is unauthorized or one which the corporation had no legal capacity to make. Such a contract

may be illegal in the true and proper sense, but it may also be one involving no moral turpitude and offending against no express statute. The inexact and misleading use of the word "illegal," as applied to contracts of corporations, *ultra vires* only, has been frequently alluded to. Comstock, Ch. J., Bissell v. M. S. Railroad Co., 22 N. Y. 268; Archibald, J., Riche v. Ashbury Railway Carriage Co., L. R. 9 Exch. 293; Lord Cairns, S. C. on appeal, L. R. 7 Eng. & Ir. App. 672.

The lease now in question was not in any true sense of the word illegal. It was undoubtedly void as against the State. The parties to the lease assumed it to be valid. It was contemplated, as the provisions of the lease show, that the lessee would continue and extend the business before carried on by the plaintiff, and it is not suggested that he did not, during its occupation, discharge all the obligations to the public which rested upon the plaintiff. The State has not intervened, and the possession of the property has now been restored to its original proprietors. The contract has been terminated as to the future, and all that remains undone is the payment by the lessee of the unpaid rent. We think the demands of public policy are fully satisfied by holding that, as to the public, the lease was void, but that, as between the parties, so long as the occupation under the lease continued, the lessee was bound to pay the rent, and that its recovery may be enforced by action on the covenant. Public policy is promoted by the discouragement of fraud and the maintenance of the obligation of contracts, and to permit a lessee of a corporation to escape the payment of rent by pleading the incapacity of the corporation to make the lease, although he has had the undisturbed enjoyment of the property, would be, we think, most inequitable and unjust. It has been suggested, to avoid the apparent injustice which would result from holding that there could be no recovery on the contract for past-due rent, that there might be a remedy on an implied contract to pay the value of the use of the property. But if the express contract was illegal in a proper sense, and the parties to the lease were guilty of a public wrong, so as to preclude a court of equity to entertain jurisdiction on the application of a lessor to be relieved from the lease and to be restored to the possession of the leased property, as was held in the case of The St. Louis, V. & T. H. Railroad Co. v. Terre Haute & I. Railroad Co., 145 U. S. 393, then surely it would be a mere evasion and would be inconsistent with legal principles for the court to imply a contract from the occupation under the illegal lease to relieve the wrongdoer from the dilemma into which he had voluntarily placed himself. We think the rule which should be applied is that the lessee is bound by the contract so long as he remains in possession.

It is unnecessary now to determine whether a lessee under an *ultra vires* lease may relieve himself from liability in the future by abandoning the possession and restoring, or offering to restore, it to the lessor.

The courts in this State from an early day, commencing as far back as the Utica Insurance Cases, have sought to regulate and restrict the defense of *ultra vires* so as to make it consistent with the obligations of justice. *Utica Ins. Co. v. Scott*, 19 John. 1; *Curtis v. Leavitt*, 15 N. Y. 9; *Bissell v. M. S. Railroad Co.*, 22 *id.* 260, Op. Comstock, Ch. J.; *Parish v. Wheeler*, *id.* 495; *Whitney Arms Co. v. Barlow*, 63 *id.* 62; *Pratt v. Short*, 79 *id.* 437; *Woodruff v. Erie Railway Co.*, 93 *id.* 609; *Starin v. Edson*, 112 *id.* 206. The case of *Woodruff v. Erie Railway*, *supra*, is very much in point in the present controversy. It was there held that the lessee of a railroad could not resist the payment of rent which accrued during its occupation under the lease on the ground that the lessor's title was derived under an *ultra vires* transaction. Our conclusion, therefore, is that the main question was properly decided against the defendant. It is said, however, that the contract was a Maine contract, and that by the law of that State the lease was illegal and void and no action could be maintained upon it. It is a sufficient answer to this claim that the law of Maine on the subject does not appear by the record, and that it is the duty of this court, therefore, to determine the case according to the law of New York as established, or in the absence of controlling authority, as justice having regard to all interests may seem to the court to require.

The question as to the liability of the defendant for the taxes assessed in 1890 was, we think, correctly adjudged.

Finding no error in the record, the judgment should be affirmed.

All concur with ANDREWS, Ch. J., for affirmance, except VANN, J., dissenting.¹ Judgment affirmed.

In re NATIONAL PERMANENT BUILDING SOCIETY.
Ex parte WILLIAMS.

IN CHANCERY, BEFORE SIR G. M. GIFFORD, L. J., DECEMBER 17,
1869.

[*Reported in Law Reports, 5 Chancery Appeals* 309.]

THIS was a motion made by special leave of the Court of Appeal to discharge an order of the Master of the Rolls, whereby the National Permanent Benefit Building Society was ordered to be wound up.

¹ The dissenting opinion of Vann, J., has been omitted.—Ed.

The company was formed under the Benefit Societies Act, 6 and 7 Will. 4, c. 32, and commenced business in February, 1865.

The principal object of the company, as stated in the affidavit of Mr. W. Richardson, the secretary, was to provide a safe mode of investment for the funds of another society, called the National Savings Bank Association.

The rules contained the usual provisions for advancing money to members who held shares, and also contained powers of investing money in the hands of the directors; but there was no power to borrow money.

The prospectus, which was issued after the rules had been certified, contained the following announcement: "The directors have made arrangements to borrow sums to be advanced to such members as desire to receive an advance before the time for it regularly arrives, such members, of course, paying interest on the sums lent, until their turn arrives."

In September, 1865, the Building Society borrowed £400 from the Savings Bank Association, which was forthwith advanced by the directors of the Building Society to a member on mortgage security; and the mortgage deed was deposited with the Savings Bank, and the contributions of the member paid into the Savings Bank. In January, 1866, the Building Society borrowed a further sum of £900, which was applied in advances to members, and secured in like manner. Shortly afterward the Savings Bank stopped payment, at which time they had advanced £1300 to the Building Society. The Savings Bank Association was subsequently ordered to be wound up.

On the 13th of July, 1867, the Master of the Rolls made an order to wind up the Building Society as an unregistered company under Part 8 of the Companies Act, 1862. The order was made on the petition of the official liquidator of the Savings Bank Association, who claimed to be a creditor for £1300 due to that association.

A proof for that sum was afterward admitted against the estate of the Building Society, and an order for a call was made upon the contributories for payment of it. From this order J. W. Williamson and others, who had been settled on the list of contributories, appealed.

When the appeal was opened before the Lord Justice Giffard it appeared that there was no debt due from the Building Society except the £1300 on which the winding-up petition was founded; and as the ground of the appeal was that this debt was invalid, the Lord Justice directed notice of motion to be given to discharge the winding-up order. This having been done, the two applications came on together.

The principal promoters of the Building Society were also promoters of the Savings Bank Association, and J. W. Williamson and some others of the appellants were directors or otherwise office bearers in both companies.

Roxburg, Q. C., and Cottrell for the appellants.

R. Baggallay, Q. C., and Higgins for the official liquidator.

GIFFARD, L. J. In point of form this is an appeal from an order of the Master of the Rolls, but in reality the point on which I am about to determine this case was never brought fairly, or argued, before him, and therefore the matter is very similar to an original hearing before me.

The case, when it is examined, is a perfectly simple one, but before I go into it I will dispose of what Sir Richard Baggallay said as to the parties who are making this application, and as to the delay. I quite agree that in many cases delay may be of very great importance, especially if it has been shown that there have been sales of property or other dealings. I do not find in this case that anything of that description has taken place. Then, as regards parties, the nature of the case is such that I do not consider these parties personally disabled from bringing forward the case, more especially as they are not the only contributories on the list, they being about nine out of a number of thirty-six. But, although I think the winding-up order ought not to have been made, I certainly shall give them no costs.

The matter itself is a very simple one. This company is what is called a benefit building society. Until the recent decision of the court in *Laing v. Reed*, Law Rep. 5 Ch. 4, it was doubted whether, even if you put a limited borrowing power among the rules of a society of this sort, that particular rule would be legal. But, what we have here is a limited benefit building society without any power to borrow, and the rules and very nature of that society show that it would be contrary to its constitution to borrow money so as to bind the company, or make the individual members of the company, as members, liable for borrowing money; because the whole constitution of the society is that the members are to make certain monthly payments, and in consideration of these monthly payments and the fines provided by the rules they are to receive certain loans.

After the rules had been certified and published, and the nature of the company had been fixed, a prospectus was issued, and by that prospectus the directors chose to say "that they have made arrangements to borrow sums to be advanced to such members as desire to receive an advance before their turn for it regularly arrives, such members of course paying interest on the sum lent until their turn arrives." If we look at the nature of the company, that

can only amount to this: that the directors have chosen to pledge their personal liability. It is not a statement that the company were liable, or that any person who was a member of the company was at all bound or was personally made liable in respect of any debt of the company.

This being so, let us see on what ground this winding-up order was made. It was made upon the petition of a creditor, and in order to support that petition the petitioner must have made out that he was a creditor, either legal or equitable—either character would be sufficient. I have already said that this benefit building society could not incur a debt by borrowing money upon loan. Indeed, the contrary has hardly been argued. It could not do so any more than a mining company or any other of the companies which have not authority or power to bind their members by borrowing money. There was no legal debt, and if no legal debt, the next thing to inquire is, whether there was an equitable debt? A class of cases has been referred to on that subject, the principal of which are *In re German Mining Co.*, 4 D. M. & G. 19, and *In re Cork & Youghal Railway Co.*, Law. Rep. 4 Ch. 748, the latter of which was before the Lord Chancellor and myself a short time ago. I have no hesitation in saying that those cases have gone quite far enough, and that I am not disposed to extend them. They were decided upon a principle, recognized in old cases, beginning with *Marlow v. Pitfield*, 1 P. Wms. 558, where there was a loan to an infant, and the money was spent in paying for necessities, and in another case of a more modern date, where there was money actually lent to a lunatic, and it went in paying expenses which were necessary for the lunatic. In such cases it has been held, that although the party lending the money could maintain no action, yet, inasmuch as his money had gone to pay debts which would be recoverable at law, he could come into a court of equity and stand in the place of those creditors whose debts had been so paid. That is the principle of those cases. It is a very clear and definite principle, and a principle which ought not to be departed from.

Then it is said that the present case is brought within that principle. I do not think it necessary to go through the evidence. Suffice it to say that there is no proof whatever that one sixpence of this money went in payment of any debt which was recoverable against the company. In truth, all this money went for the purpose of loans to members of this company. It is not for me to say whether the Savings Bank Association that lent the money have or have not any right, either as against the property of this company, which was pledged to them, or as against the persons to whom this money was lent. If they have any such rights, they

can only be asserted by filing a bill and taking a very different proceeding from that which has been taken here.

I am, therefore, of opinion that there is no legal or equitable debt. The winding-up petition is in the nature of an execution against the company. Whether the parties may or may not themselves be personally liable, or however much I may disapprove of their conduct, they are not to be precluded from showing that the title of the creditor to sustain a winding-up petition totally fails, as it does in this case. The consequence is that the winding-up order, the proof of the debt, and the order for the call must all be discharged. But, as I said before, the conduct of these parties has been such as to disentitle them to any costs.

Solicitors: *Brady & Son; Lewis, Munns & Co.*

DANIEL PRATT *et al.*, ASSIGNEES, ETC., v. HENRY W. SHORT *et al.*, RESPONDENTS.

IN THE COURT OF APPEALS OF NEW YORK, JANUARY 13, 1880.

[*Reported in 79 New York Reports 437.*]

APPEAL from judgment of the General Term of the Supreme Court, in the Fourth Judicial Department, in favor of defendants, entered upon an order reversing a judgment in favor of plaintiffs, entered upon the report of a referee, and directing final judgment for defendants.

The nature of the action and the facts are set forth sufficiently in the opinion.

Daniel Pratt for appellants.

Geo. N. Kennedy for respondents.

ANDREWS, J.¹ The People's Safe Deposit and Savings Institution, a corporation created by c. 816 of the Laws of 1868, in August, 1872, upon the application of defendants, composing the firm of H. W. Short & Co., discounted a note made by one Alice Van Cleek, for \$1900, payable to the order of H. W. Short & Co. seventy days after its date, and indorsed by the payees, who received the proceeds of the discount. The note was taken by H. W. Short & Co. upon a debt owing by the maker to the payees. It was not paid at maturity, and was duly protested. The Safe Deposit Co. in September, 1872, became bankrupt, and the plaintiffs were appointed assignees in bankruptcy of the insolvent corporation. This action is brought by the plaintiffs as such as-

¹ A portion of the opinion has been omitted.—Ed.

signees against the defendants, and in their complaint they allege three causes of action: First, a cause of action against the defendants as endorers of the note referred to; second, for money lent and advanced by the Safe Deposit Co. to the defendants upon the security of the note, and third, for money had and received by them, to and for the use of the corporation. . . .

It appears from the evidence in the case that the corporation in question, at, and prior to the time of the discount of the note set out in the complaint, used its funds derived from deposits and otherwise, in discounting commercial paper, and exercised the usual and ordinary powers of a bank of discount. This course of business was expressly prohibited by the restraining act, and independently of that act, was in violation of the restrictions imposed by the eleventh section of the charter of the company.

I have no difficulty therefore in reaching the conclusion that the discount by the corporation of the note in question was unlawful, and upon general principles of law applicable to the subject as well as by the terms of the restraining act, the security taken by the company was void, and furnishes no ground of action. *Thalimer v. Brinkerhoff*, 20 J. R. 386; *N. Y. Firemen's Ins. Co. v. Ely*, *supra*; *Bank of Salina v. Alvord*, 31 N. Y. 474; *Crocker v. Whitney*, 71 *id.* 161; *N. Y. State Loan and Trust Co. v. Helmer*, 77 *id.*, *supra*.

It is claimed, however, that the plaintiffs as representatives of the insolvent corporation, notwithstanding the invalidity of the note, are entitled to recover the money received by the defendants upon the void security, and this presents the only remaining question in the case.

It is no doubt the general rule of law that no right of action can spring out of an illegal contract. And the rule that an illegal contract cannot be enforced, applies as well to contracts *malum prohibitum*, as to contracts *malum in se*. But it does not necessarily follow that all the consequences attending a contract, which is contrary to public morals, or founded on an immoral consideration, attend and affect a contract *malum prohibitum* merely. The law in the former case will not undertake to relieve parties from the position in which they have placed themselves, or to adjust the equities between them. But in the latter case, while the law will not enforce the prohibited contract, it will take notice of the circumstances, and if justice and equity require a restoration of money or property, received by either party thereunder, it will, and in many cases has given relief. So also a prohibitory statute may itself point out the consequences of its violation, and if, on a consideration of the whole statute, it appears that the legislature intended to define such consequences, and to exclude any other

penalty or forfeiture than such as is declared in the statute itself, no other will be enforced, and if an action can be maintained on the transaction of which the prohibited transaction was a part, without sanctioning the illegality, such action will be entertained. The case of *Robinson v. Bland*, 2 Burr. 1077, is a leading case, illustrating this principle. The statute (9 Anne, c. 14) declared that "all notes, bills, bonds, judgments, mortgages, or other securities for money won or lent at play, shall be void," etc. The declaration counted upon a bill of exchange drawn by the defendant's intestate, and also contained the money counts. The bill was given, in part, for money won at play by the plaintiff of the defendant's intestate, and in part for money lent at play to the intestate. The defendant interposed the statute as a bar to the recovery. The defense was allowed as to money won, but was overruled as to the money lent. Lord Mansfield said: "As to the money won, we think it cannot be recovered; as to the money lent, the plaintiff is entitled to it." Denison, J., said: "There is a distinction between the contract and the security." Wilmot, J., speaking of the claim for money lent, said: "The contract may be good, though the security be void; and I think the contract is good, though the security is void by the statute of 9 Anne."

In determining whether the legislature intended, in the charter in question, that a violation by the company of the restriction as to investments, contained in the eleventh section, should not only render the unauthorized security void, but also work a forfeiture of the money loaned thereon, it is important to consider the purpose and object which the legislature had in view in making the restriction. Plainly, the main object was to secure the fund of depositors against loss by insecure and hazardous investments. The State, by the charter, held out the company as a savings bank. The legislature well understood that it would be made the custodian of the savings of individuals dealing with the corporation, and it was eminently wise and just that the bank should be so restricted in respect to the character of the investment it should make as to afford reasonable assurance that the trust would be safely administered. The risk of losing the benefit of securities taken in violation of the charter would naturally induce care on the part of the managers of the corporation in confining investments to the authorized securities, but to hold that the illegal action of the directors in investing in unauthorized securities not only debarred a recovery thereon, but also put the fund itself thus illegally used, and which the restriction was intended to protect, beyond the power of reclamation from the hands of the borrower, would seem to contravene rather than support the policy upon which the restriction was founded.

The effect of the restraining act upon contracts made in violation of its provisions, was considered in a series of cases, known as the Utica Insurance Cases, commencing with the case of *Utica Insurance Co. v. Scott*, 19 J. R. 1. In these cases the company had, in violation of the restraining act, carried on the business of discounting paper, exercising in respect thereto ordinary banking power. And it was held that the securities taken on such discounts were void, but that the money loaned could be recovered. The court, in the case in *Johnson*, say.: "The lending money is not declared to be void, and, therefore, whenever money has been lent it may be recovered, although the security itself is void," citing, among other authorities, the case of *Robinson v. Bland*, *supra*. This distinction was adopted and followed in several subsequent cases. *Utica Ins. Co. v. Kip*, 8 Cow. 20; *Utica Ins. Co. v. Cadwell*, 3 Wend. 296, and *Utica Ins. Co. v. Bloodgood*, 4 *id.* 652. These cases have been criticised, but have never been overruled. *Mercein v. People*, 25 Wend. 64; *Tracy v. Talmage*, 14 N. Y. 189; *Curtis v. Leavitt*, 15 *id.* 97. The first restraining act was passed in 1804, and was re-enacted in 1813 (2 R. L. 234), and extended in 1818. Laws 1818, c. 236. The object of these enactments, as shown by *Savage, C. J.*, in *New York Firemen's Ins. Co. v. Ely*, *supra*, was to protect the chartered banks in the monopoly of banking, and to exclude other corporations, associations, or individuals from conducting a banking business in either department, of issue, deposit, or discount. But the State subsequently departed very widely from this policy. In 1837 the legislature repealed the restriction before existing, preventing individuals or unincorporated associations from keeping offices of deposit and discount. Laws of 1837, c. 20. This act, as was said by *Comstock, J.*, in *Curtis v. Leavitt*, 15 N. Y. 97, reduced banking to a private business, except in the department of creating a circulating medium. After this repeal any person or association except incorporated companies could conduct the business of receiving deposits and making discounts. In 1838 the legislature, by the general banking law, opened the whole franchise of banking to any person or association of persons, subject only to the condition of complying with the provisions of the act.

It will be seen, from this reference to the law, that the policy upon which the restraining acts were passed, viz.: the securing of the monopoly of banking to special favorites of the legislature, has been abandoned. Any individual, or association of individuals, may now conduct the business of receiving deposits and discounting commercial paper. The restraint continues as to incorporated companies not authorized by their charter to conduct the busi-

ness. The only public policy upon which this remaining restriction upon incorporated companies against discounting paper seems now to rest, is that of restraining corporations from exercising powers not granted by their charters. The Utica Insurance Cases have stood as the law of the State for more than forty years. They gave a construction to the restraining laws which has never been reversed. The court is not called upon at this late day, in a case similar in principle, and involving the construction of the same statute, to reconsider the grounds of those decisions, especially when there remains but a remnant of the policy upon which they were founded, and when the business of discounting notes has been made lawful as to all the world except corporations not authorized by their charters to conduct it. In view of the special language of the restraining act, and the specification of the consequences which should follow the unlawful discount of commercial paper, there is great force in the suggestion that the legislature regarded the particular penalty imposed, and the remedy by *quo warranto* or by an action in equity to restrain the exercise by a corporation of unauthorized powers, as a sufficient protection against corporations, or individuals unlawfully engaging in the business of discounting paper, and that it was not intended that they should also forfeit all claim to money loaned or advanced upon the prohibited security.

The justice of the particular case before us calls for no departure from these decisions. If the defendants avoid their endorsement it is the plainest equity that they shall restore the money which they received on the faith of it.

The judgment of the General Term should be reversed, and the judgment of the Special Term affirmed, with costs.

All concur.

Judgment accordingly.

RAILWAY CO. v. IRON CO.

IN THE SUPREME COURT OF OHIO, OCTOBER 16, 1888.

[Reported in 46 Ohio State Reports 44.]

ERROR to the Circuit Court of Cuyahoga County.

The original suit was brought into the Court of Common Pleas in the county where instituted on appeal from a justice of the peace.

From the petition filed in the Common Pleas, it appears that The Lake Erie Iron Co., plaintiff, and The Valley Railway Co., de-

fendant below, are each incorporated companies under the laws of this State; and that the plaintiff asked to recover of the defendant on an account for goods sold and delivered, the sum of \$253.30. The account consisted of iron and iron forgings, amounting to the sum claimed.

The defendant answered, denying, first, any indebtedness upon the account; and added, as a second defense, and by way of counter-claim, "that the plaintiff is now and has been for the last twelve years and over, a large manufacturer of such iron goods as are named in the account attached to the petition and of other iron goods used in the construction and the operation of the railroads, and consumes in the manufacturing of such goods daily a large amount of coal; that said Iron Co. is now, and has been for the last ten years and over, largely interested in the matter of reducing the price of coal in the city of Cleveland.

"That the construction of railroads from said city of Cleveland to the coal fields in said State, south of said city, tends to reduce the price of coal in said city. That the said plaintiff, to bring about and aid in the construction of the railroad of the defendant, from said city to said coal fields, and in order to effect a sale of iron goods by it manufactured, entered into a written contract with the defendant on or about the 1st day of February, 1873, a copy of which contract, marked 'Exhibit A,' is hereto attached and made a part of this answer. That in said contract the said plaintiff agreed to manufacture for and deliver to the defendant, iron and forgings of the value of two thousand dollars (\$2000), and to take in pay therefor forty shares of the capital stock of the defendant at its par value; to the entering into and making said contract by the plaintiff, each and every one of its members and stockholders at the time thereof assented to and requested. That under said contract, and in accordance therewith, the defendant did, on or about the 1st day of January, 1881, apply to the plaintiff for the articles described and charged in the account, a copy of which is attached to the petition, and received from the plaintiff, on or about the date last mentioned, said goods under and in pursuance of said contract. That all the provisions of said contract that were to be performed and carried out by the defendant have been by it performed and carried out, excepting only the delivery by it of the certificate of said forty shares to the plaintiff, which has not been done for the reason that the plaintiff wholly refuses to manufacture for and deliver to the defendant any more iron and forgings. That the defendant is, and has been ever ready to receive from the plaintiff, iron and forgings in payment for the balance due for said forty shares of stock from the plaintiff, and has so repeatedly notified and duly demanded the same of the

plaintiff, but the plaintiff did, prior to, and has ever since the commencement of this action, utterly refused and still refuses to carry out its said contract;" and asked judgment for the balance, \$1746.70, due on the subscription.

The plaintiff demurred to the pleading on the ground that it is insufficient as a defense, or counter-claim. The court sustained the demurrer, to which the defendant excepted; and, proceeding "to take the account, hear the proofs, and assess the damages," found for the plaintiff in the sum of \$295.04, and rendered judgment accordingly.

The defendant, The Valley Railway Co., prosecuted error to the district court, claiming that the court erred in sustaining the demurrer of the plaintiff to its answer. The judgment was affirmed by the Circuit Court, and this proceeding is prosecuted to reverse the judgment in both of the lower courts.

The principal questions arising upon the record are, first, whether the facts pleaded in the answer constitute a defense, and, second, whether they constitute a counter-claim in favor of the defendant against the plaintiff.

W. J. Boardman for plaintiff in error.

Henderson, Kline & Tolles for defendant in error.

MINSHALL, J. We think it well settled as a result of the decisions in this State, as well as elsewhere, that an incorporated company cannot, unless authorized by statute, make a valid subscription to the capital stock of another; that such subscription is *ultra vires* and void.

The next question then is, whether the plaintiff, the Iron Co., can recover the value of the goods delivered by it in part performance of the contract on which the subscription was made?¹ We shall treat the question as if the action had been in plain terms for such a recovery, without embarrassing it with a doubt as to whether such a recovery could be had in the form of a suit for goods sold and delivered.

It is quite certain that the simple fact that the plaintiff was under no legal obligation to deliver the goods, the contract of subscription being void, is no ground for a recovery of their value against the defendant, although the plaintiff may have been ignorant of the law affecting the contract. Bish. Cont. §§ 615 and 81. To warrant a recovery in such a case, it must further appear that the delivery was made in ignorance of the facts, or else that it was an involuntary one. *Clark v. Dutcher*, 9 Cowan, 674, 684; *Lamborn v. County Commissioners*, 97 U. S. 181; *Babcock v. Fond du Lac*, 58 Wis. 230; *Savings Institution v. Linder*, 74 Pa. St. 371; *Inhabitants of Livermore v. Inhabitants of Peru*, 55 Me. 469; Bish.

¹ Only so much of the opinion is given as relates to this question.—Ed.

Cont. § 631; Pol. Cont. 409, and notes. But there is no ground for either of these claims. The delivery was a voluntary one, with full knowledge of the facts, which forbids a recovery of the value of the goods so delivered, unless some reason exists why corporations should be assisted against the consequences of their voluntary acts, in cases where private persons would not.

The fact that corporations are generally not liable for the unauthorized acts of their agents, and may repudiate the same, does not seem to furnish a solution of this question. The principle which denies a recovery in this class of cases will be found to rest upon considerations of general convenience, to which corporations as well as natural persons are required to conform. Remedial justice is established to aid those who cannot aid themselves without the use of violence, in obtaining what as a matter of right is their due. It does not invite litigation, and declines its assistance to those who voluntarily place themselves in the situation of becoming suitors. The Iron Co. was at liberty by its agents to accede to the demand of the railroad company for the delivery of the goods on the subscription, or to decline to do so. It chose, with a full knowledge of the facts, to deliver the goods; and there is no sound reason why it should be aided in a lawsuit made necessary by its own voluntary act, that would not apply with equal force to a natural person. Where there is no ignorance of the facts, or coercion, it is said, in *Glass Co. v. City of Boston*, 4 Met. 181: "If the party would resist an unjust demand, he must do so at the threshold. The parties treat with each other upon equal terms, and if litigation is intended by the party of whom the money is demanded, it should precede payment. If it were not so, the effect would be to leave the party who pays the money the privilege of selecting his own time and convenience for litigation; delaying it, as the case may be, until the evidence, which the other party would have relied upon to sustain his claim, may be lost by lapse of time and the various casualties to which human affairs are exposed." In some cases stress is laid upon the inconvenience it would be to the other party, who may receive the money as his own, and, acting upon that belief, so dispose of it as to make it exceedingly inconvenient, if not impossible, to repay it. *Brisbane v. Dacres*, 5 Taunt. 144, Gibbs, J., 152; *Clark v. Dutcher*, 9 Cowan, 674, 684. In any view, however, the reason of the rule applies with like force to a corporation as to a natural person.

Judgment reversed and cause remanded to the Court of Common Pleas, with direction to overrule the demurrer to the answer of the defendant, and for further proceedings.

JEMISON *et al.*, APPELLANTS, v. THE CITIZENS' SAVINGS
BANK OF JEFFERSON, TEXAS, RESPONDENT.

IN THE COURT OF APPEALS OF NEW YORK, SECOND DIVISION,
OCTOBER 7, 1890.

[*Reported in 122 New York State Reports 135.*]

APPEAL from judgment of the General Term of the Supreme Court in the First Judicial Department, entered upon an order made January 30, 1888, which affirmed a judgment in favor of defendant entered upon a decision of the Special Term dismissing the complaint.

The nature of the action and the facts, so far as material, are stated in the opinion.

Francis C. Barlow for appellant.

Benjamin H. Bristow and *William D. Guthrie* for respondent.

HAIGHT, J. The plaintiffs were commission merchants and members of the Cotton Exchange of the city of New York. The defendant was a savings bank and trust corporation organized under the laws of Texas.

This action was brought to recover commissions, and for money claimed to have been expended for the defendant on the purchase and sale of cotton futures.

The defense was that the defendant, as a savings bank and trust corporation, had no power or authority to deal in the purchase and sale of cotton for future delivery, or in contracts for the purpose of speculation.¹

This brings us to the question whether or not the defendant had the power to make the orders in question. The defendant was incorporated and chartered in 1871 by an act of the legislature of the State of Texas, entitled "An Act to incorporate the Citizens' Savings Bank of Jefferson, Texas." The act, among other things, provides that "the general business and object of this corporation shall be to receive on deposit or in trust such sum or sums of money as may from time to time be offered therefor by tradesmen, merchants, clerks, laborers, servants and others, to be repaid to such depositors when demanded, at such times, with such interest, and under such regulations as the board of directors may from time to time prescribe;" and, also, "this corporation may loan money according to the Constitution and laws of the State, or may discount in accordance with bank usages, taking such security therefor, either real or personal, as the directors may deem sufficient. Said corporation shall have power to borrow money,

¹ Only so much of the opinion is given as relates to this question.—Ed.

buy and sell exchange, bullion, bank-notes, government stocks and other securities." The act further provides that the business of the corporation shall be managed by twelve directors.

Corporations are artificial creations existing by virtue of some statute and organized for the purposes defined in their charters. A person dealing with a corporation is chargeable with notice of its powers and the purposes for which it is formed, and when dealing with its agents or officers is bound to know the extent of their power and authority. A corporation necessarily carries its charter ~~wherever it goes~~, for that is the law of its existence. It follows that the plaintiffs must have known or are chargeable with knowledge of the corporate powers of the defendant and of the extent to which its cashier could bind the corporation. *Alexander v. Cauldwell*, 83 N. Y. 480; *Hoyt v. Thompson*, 19 *id.* 207-222; *Relfe v. Rundle*, 103 U. S. 222-226; *Davis v. Old Colony R. R. Co.*, 131 Mass. 258-260; *Leonard v. A. Ins. Co.*, 97 Ind. 299.

Savings banks are designed to encourage economy and frugality among persons of small means and are organized with restrictions and provisions intended to secure depositors against loss. Speculative contracts entered into for the sale or purchase of stock by a savings bank at the stock board or elsewhere, subject to the hazard and contingency of gain or loss, are *ultra vires*, and a perversion of the powers conferred by its charter. *People, etc., v. M. & T. S. Inst.*, 92 N. Y. 7-9; *Sistare v. Best*, 88 *id.* 527-531. Contracts of corporations are *ultra vires* when they involve adventures or undertakings outside and not within the scope or power given by their charters. The acts under which they are organized were framed in view of the rights of the public and the interests of the stockholders. As artificial creations they possess only the powers with which they were endowed. An act may be *malum in se* or *malum prohibitum*, or an act may not be immoral or prohibited by any statute, and still it may be in excess of the powers vested in the officers of a corporation, unauthorized and prejudicial to the stockholders. In either case the plea of *ultra vires* should prevail, unless it would defeat justice or accomplish a legal wrong. *Huntington v. Savings Bank*, 96 U. S. 388; *Thomas v. R. R. Co.*, 101 *id.* 71; *Nassau Bank v. Jones*, 95 N. Y. 115; *Leslie v. Lorillard*, 110 *id.* 519.

As we have seen, the defendant was chartered for the purpose of receiving on deposit or in trust such sums of money as may from time to time be offered by tradesmen, merchants, clerks, laborers, servants, and others. It was authorized to loan these moneys according to the Constitution and laws of the State and to discount in accordance with bank usages, taking such security

therefor, either real or personal, as the directors may deem sufficient. In addition thereto the defendant was given power to borrow money, buy and sell exchange, bullion, bank-notes, government stocks and other securities. The authority here given to buy and sell exchange, bullion, bank-notes, government stocks and other securities does not embrace or include speculative contracts in cotton futures any more than it does hay, oats, provisions, or dry goods. The exchange, bullion, bank-notes, securities, etc., authorized are those of fixed value, current in the market and not subject to the control of speculators. While the buying and selling of cotton to be delivered in the future may not ordinarily be immoral or prohibited by any statute, it is not included in the powers given to the defendant by its charter. The transaction in question was prejudicial to its stockholders and tended to endanger and destroy the safeguards provided for the depositors. The stockholders and depositors had the right to have their funds invested in accordance with the provisions of the charter and the Constitution and laws of the State, and in so far as this right was violated by the transaction in question it was a misappropriation of the funds and immoral.

It is contended that the defense of *ultra vires* is not available in this case, for the reason that the contract had been executed on the part of the plaintiffs and that the defendant is estopped from setting up the defense. In the case of *Whitney Arms Co. v. Barlow*, 63 N. Y. 62, the plaintiff was a corporation organized for the purpose of manufacturing every variety of firearms and other implements of war, and all kinds of machinery adapted to the construction thereof. It entered into a contract with the American Seal Lock Co. to manufacture and deliver 10,000 locks. The locks having been delivered, it was held that the contract was fully executed, and that the plea of *ultra vires* would not prevail as a defense to an action brought to recover the contract price. We do not question the rule thus invoked. It has been repeatedly declared in other cases, as for instance, in *Parish v. Wheeler*, 22 N. Y. 494, in which it was held that a railroad company having purchased and received a steamboat could be compelled to pay for it, although the power to purchase such boat was not included in its charter. But this doctrine has no application to executory contracts which are sought to be made the foundation of an action, or to contracts that are prohibited as against public policy or immoral. *Nassau Bank v. Jones*, *supra*; *P. C. & S. L. R. Co. v. K. & H. B. Co.*, 131 U. S. 371-389.

In the case at bar, the transaction as we have seen was not only immoral and in violation of the rights of the stockholders and depositors, but the defendant had received nothing by virtue of it.

The cotton had been purchased by the plaintiffs in their own name, they taking title thereto and holding it upon the defendant's account. It was purchased under the rules of the Cotton Exchange of the city of New York, in which the members doing business therein with other members act as principals and are liable as such. The most that can be claimed is that they held the cotton on the contracts therefor subject to the call or order of the defendants. There had been no delivery of any cotton or property of any kind, or transfer of any title to such property to the defendant. If the steamboat had never been delivered to the railroad company so as to transfer the title thereto, or if the 10,000 locks had never been delivered to the American Seal Lock Co., very different questions would have been presented in the cases to which we have called attention. We consequently are of the opinion that under the circumstances of this case the defense of *ultra vires* is still available to the defendant.

We consequently are of the opinion that the judgment should be affirmed with costs.

All concur.

Judgment affirmed.

CHAPTER V.

CORPORATE LIABILITY FOR TORTS.

MAUND *v.* THE MONMOUTHSHIRE CANAL CO.

IN THE COMMON PLEAS, TRINITY TERM, 1842.

[*Reported in 4 Manning & Granger 452.*]

TRESPASS, for breaking and entering locks on a canal, and seizing and carrying away barges and coal.

Pleas: Not guilty (by statute), 36 G. 3, c. 102, and payment of money into court.

At the trial, before Cresswell, J., at the last assizes for Monmouthshire, it was proved that the trespasses in question had been committed by one Cooke, who was the agent of the company, which was incorporated by act of Parliament, 36 G. 3, c. 102; and that the barges and coal had been seized for tolls claimed to be due to them. The only question raised was whether trespass would lie against a corporation aggregate for an act done by their agent within the scope of his authority. A verdict was taken for the plaintiff, damages £50, leave being reserved to move to enter a verdict for the defendants.

Talfourd, Sergt., in last term, obtained a rule *nisi* accordingly, or to arrest the judgment. He cited the case of Sutton's Hospital, 10 Co. Rep. 32, Anon, 12 Mod. 559; *Morgan v. The Corporators of Carmarthen*, 3 Keb. 350; *Thusfeild & Jones' case*, Skin. 27, Com. Dig. tit. Franchises (F. 19), 6 Vin. Abr. tit. Corporations (B. a).

Ludlow, Sergt., now showed cause. The act of Parliament by which the company is incorporated provides that they may sue and be sued; it also empowers them to enter on lands. If they enter improperly, it would seem that they may be sued for the trespass. The whole doctrine that a corporation cannot be sued in trespass rests on one passage in Bro. Abr. Corporations, 43a, where the reason given is that neither *capias* nor *exigent* can go against them. A *distringas*, however, may be issued against a corporation. It has been decided that trover will lie against a corporation. *Yarborough v. The Bank of England*, 16 East, 6; where

Lord Ellenborough, Ch. J., in giving the judgment of the court, reviews all the authorities upon the subject. [Tindal, Ch. J. That case was after verdict. It was a motion in arrest of judgment; no leave appears to have been reserved.] But the broad doctrine is laid down that trover would lie; and there is no difference in principle between that action and trespass. The payment into court in this case admits that the action is rightly brought. An indictment will lie against a corporation, although all the ordinary consequences cannot follow. Various instances are collected in Kyd on Corporations, Vol. I., pp. 223-225, where trespass has been brought against a corporation. Other authorities are mentioned in 1 Wms. Saund. 340, n. The principle that a corporation is liable in tort for the tortious act of its agent done in its ordinary service is further carried out in *Smith v. The Birmingham Gas Co.*, 1 A. & E. 526. [Tindal, Ch. J. The process is the same, both in case and in trespass—namely, by attachment, distress, *capias*, and outlawry. If case will lie, it is difficult to see why trespass should not lie also.]

Talfourd, Sergt., was then called upon to support the rule, and admitted that he had nothing to rely upon but the old authorities; and that in *Regina v. The Birmingham & Gloucester Railway Co.* the court of Queen's Bench had in this term refused to quash an indictment against a corporation. The doctrine in *Bro. Abr.*, however, is imported into *Com. Dig. tit. Franchises (F. 19)*.

TINDAL, Ch. J. The process in case and trespass being the same, it is impossible to see any distinction between the two actions.

Per Curiam. Rule discharged.

GARRET BROKAW *v.* THE NEW JERSEY RAILROAD
CO. AND ANOTHER.

IN THE SUPREME COURT OF NEW JERSEY, NOVEMBER TERM, 1867.

[Reported in 32 *New Jersey Law Reports* 328.]

IN TRESPASS. Demurrer to declaration.

The plaintiff declared against the defendant for removing and ejecting him, with force and arms, etc., out of one of the cars of the said railroad company, while he was traveling in said car, on the road of said company, and thereby bruised and wounded him, to his great damage, etc. To this declaration the defendants put in a general demurrer, which was argued before the CHIEF JUSTICE, and VREDENBURGH, WOODHULL, and DEPUE, JJ.

I. W. Scudder for the defendants.

H. V. Speer for the plaintiff.

DEPUE, J. The declaration in this case charges that the New Jersey Railroad and Transportation Co., by their servants and William Campbell, the other defendant, with force and arms, assaulted the plaintiff, and ejected and expelled him from a certain car in which he was riding, on the New Jersey Railroad, and wounded, bruised, and ill-treated him.

To this declaration the defendants have filed a general demurrer, and upon the argument two questions were raised:

First. Whether an action of trespass, for an assault and battery, can be maintained against a corporation,¹ and

Second. Whether in such action an individual can be joined as a co-defendant with a corporation.

In the earlier cases it was held that an action of trespass could not be maintained against a corporation aggregate, for the technical reason that a *capias* and *exigent*, the proper process in actions of trespass, would not lie against a corporation; but this technical objection was not uniformly yielded to, as instances of actions of trespass against corporations are to be met with as early as the year books A. & A. Corp. sec. 385; notes to *Maund v. Monmouthshire Canal Co.*, 4 M. & G. 454. As corporations became more numerous and were multiplied, until aggregated capital, seeking investment for the purposes of business, is generally invested under acts of incorporation to protect individuals from personal liability, technical objections which stood in the way of subjecting corporations to actions founded on torts have been entirely swept away, and corporations have been held liable for all torts, the same as individuals. That they may be sued in trover, case, trespass *quare clausum fregit*, trespass *vi et armis*, and ejectment, is abundantly established by the cases cited by Green, C. J., in *State v. The Morris and Essex Railroad Co.*, 3 Zab. 367.

A corporation is liable for injuries resulting from neglect to repair a bridge, where the obligation to repair lies on them—*Ward v. The Newark and Pompton Turnpike Co.*, Spenc. 323; for obstructing the flow of water, whereby lands are overflowed—*Tinsman v. The Belvidere Delaware Railway Co.*, 1 Dutcher 255; *Chestnut Hill Turnpike Co. v. Rutter*, 4 S. & R. 6; for making an unlawful distress—*Smith v. The Birmingham and Staffordshire Gas Light Co.*, 1 A. & E. 526; for deceit and fraudulent representations—*Fogg v. Griffon*, 2 Allen 1; *National Exchange Co. v. Drew*, 32 Eng. L. & Eq. 1; *Barwick v. The English Stock Bank*, L. R. 2 Exch. 259; for fraud in issuing spurious stock—

¹ Only so much of the opinion is given as relates to this question.—Ed.

N. Y. & N. H. R. R. Co. v. Schuyler, 38 Barb. 534; S. C., 7 Tiffany, 30; for wrongfully and maliciously obstructing a party in his business—Green v. The London Omnibus Co., 7 C. B. N. S. 290; for maintaining a vexatious suit—Goodspeed v. The East Had-dam Bank, 22 Conn. 530; for a malicious libel—Whitfield v. The S. E. Railway Co., E. B. & E. 115; Philadelphia & W. & B. R. R. Co. v. Quigley, 21 Howard, 202; and for an assault and battery and false imprisonment—Railway Co. v. Broom, 6 Exch. 314; Chilton v. The London, etc., R. Co., 16 M. & W. 212; Roe v. Rail-way Co., 7 Exch. 36; Seymour v. Greenwood, 6 H. & N. 359; Goff v. Great Northern R. Co., 3 E. & E. 672; More v. The Fitch-burg R. Co., 4 Gray, 465; Hewitt v. Swift, 3 Allen, 420; Evans-ville & Crawfordville R. Co. v. Baum, 26 Ind. 70.

And generally it may be stated that a corporation is liable *civiliter* the same as a natural person, for the tortious acts of its servants or agents, in the course of their employment, committed by the authority of the corporation, express or implied, whether such acts fall within the designation of forcible, negligent, ma-licious, or fraudulent torts, and without regard to the form of action by which the appropriate remedy is sought. Phila. & Reading Railroad Co. v. Derby, 14 How. 486; N. Y. & N. H. R. R. Co. v. Schuyler, 7 Tiffany, 30, and per Davis, J., on p. 49; Bissel v. The Michigan Southern Railroad Co., 22 N. Y. 258; Philadelphia, W. & B. R. Co. v. Quigley, 21 How. 202; per Pol-lock, C. B., Roe v. Railway Co., 7 Exch. 40; Story on Agency, sec. 308.

And upon the trial, the question whether the corporation is liable for the acts of its servants or agents, will depend upon the same principles which govern the liability of a master for the acts of his servants. Where it is sought to hold the master liable for the trespass of his servant, the rule is somewhat different from what it is when the gist of the action is negligence. The distinction is tersely stated by Parke, B., in Sharrod v. Railway Co., 4 Exch. 585, as follows: "The maxim, '*Qui facit per alium facit per se*,' renders the master liable for all the negligent acts of the servant in the course of his employments, but that liability does not make the direct act of the servant the direct act of the master. Trespass will not lie against him; case will, in effect, for employing a careless servant, but not trespass, unless, as was said by the court in Morley v. Gainsford, 2 H. Bl. 412, the act was done by his com-mand—that is, unless either the particular act which constituted the trespass is ordered to be done by the principal, or some act which comprised, or some act which leads by a physical necessity to the act complained of."

If the trespass was committed by the agent of the company,

wilfully, or of his own malice, under color of discharging the duties of his employment; or if he has departed beyond the line of his duty to commit a trespass, the company will not be liable. But if the act of the agent was authorized by the rules and regulations of the company, or was necessary to accomplish the purposes of his employment, the company is answerable, even for the unnecessary violence of the agent. *Phila. & Reading R. Co. v. Derby*; *Seyman v. Greenwood*; *Railway Co. v. Brown*; *Roe v. Railway Company*; *Hewitt v. Smith*, cited above; *Smith on Master and Servant*, 151; *Vanderbilt v. The Richmond Turnpike Co.*, 2 Coms. 479.

In considering the question whether the agent has the authority of the corporation, so as to make it answerable for his act, the purposes for which the company was incorporated must not be overlooked. An authority given even by the board of directors, in express terms, will not, in all cases, be the authority of the corporation. The directors are only agents themselves, and their powers are necessarily limited within the scope of the purposes for which the corporation was created, beyond which they are not authorized to bind the corporation. To fix the liability of a corporation for the tortious act of one of its employees, done in obedience to the commands of its officers, the act must be connected with the transaction of the business for which the company was incorporated. If the directors should order an agent to take a person out of his house and beat him, the corporation could not be held for the assault and battery; or if the directors of a banking company should purchase a steamboat, and engage in transporting passengers, the corporation would not be liable for the misfeasance or non-feasance of agents employed in that business. But if the directors of a corporation having power to hold lands order an agent to enter on lands and take possession of them for the legitimate uses of the company, his entry, if unlawful, will be the trespass of the corporation. So if the directors, acting in their official capacity, adopt rules and regulations for the transaction of the corporate business of the company, and provide for the enforcement of such rules and regulations, and authorize its agents or servants to carry them into effect, the corporation will be liable for the acts of such agents or servants, in the course of such employment. In *Railway Co. v. Brown*, 6 Exch. 325, *Patterson, J.*, says: "An action of trespass for assault and battery will lie against a corporation, whenever the corporation can authorize the act done, and it is done by their authority;" and *Erle, Ch. J.*, in *Green v. The London Omnibus Co.*, 7 C. B. N. S. 301, says: "The ground of demurrer is that the declaration charges a wilful and intentional wrong, and that

the defendants, being a corporation, cannot be guilty of such a wrong, and, therefore, the action will not lie. But the whole of the acts that are charged against the defendants are acts connected with driving vehicles, and the defendants are a company incorporated for the purpose of driving omnibuses, and, therefore, the acts alleged to have been done by them are all acts which are within the scope and object of their formation."

In *National Exchange Co. v. Drew*, the fact that the company is benefited by the transaction in which the fraud was committed is assigned as a reason for holding it liable for the fraud of their directors.

In *Phila. & W. & B. R. Co. v. Quigley*, the libel for which the corporation was held answerable was contained in a report made by the directors to the company of the result of an investigation into the accounts of an employee, which the directors had authority to investigate, and were authorized by a meeting of the stockholders to make public. See also 2 Hilliard on Torts, 473.

The demurrer admits that the servants of the corporate defendant had competent authority to commit the assault and battery, and the case comes directly within the cases above cited. Whether, in point of fact, the servants of the company had such authority, and the corporation is liable for their acts, is a question of fact, to be determined at the trial.

The demurrer is overruled.

Barton - Jones

THE FISHKILL SAVINGS INSTITUTION, RESPONDENT,
v. THE NATIONAL BANK OF FISHKILL *et al.*
 APPELLANTS. *Barton - Jones*

IN THE COURT OF APPEALS OF NEW YORK, FEBRUARY 24, 1880.

[*Reported in 80 New York Reports 162.*]

APPEAL from judgment of the General Term of the Supreme Court in the Second Judicial Department, affirming a judgment in favor of plaintiff, entered upon the report of a referee. (Reported below, 19 Hun, 354.)

This action was brought to recover for the alleged conversion of certain United States bonds.

The facts appear sufficiently in the opinion.

John Thompson and *Homer A. Nelson* for appellants.

Milton A. Fowler and *William S. Eno* for respondent.

DANFORTH, J. Upon the facts disclosed by the record I think

the case is with the respondent. Bartow was the cashier of the defendant, the National Bank of Fishkill. He was its managing officer, its general agent in business. As such he contracted debts, and borrowed money, during a series of years, with the knowledge of its directors, and with their consent and approbation. He was at the same time the plaintiff's treasurer. In March, 1874, the plaintiff owned the bonds in question. The defendant, the National Bank, had for its correspondent in New York the Merchants' Exchange National Bank. In the latter part of March or first of April, 1874, Bartow possessed himself of the plaintiff's bonds, and in the name of the Bank of Fishkill, and as its cashier, pledged them with the Merchants' Exchange National Bank as collateral for advances made and to be made to the Fishkill Bank. Upon the faith of this security the latter bank, in the usual and ordinary course of business, continued to draw upon the former, until in July, 1874, its indebtedness amounted to upward of \$60,000. On the thirty-first day of that month the Merchants' Bank loaned to the Fishkill Bank \$60,000 upon the security of the bonds, and the sum so loaned was applied to the payment of so much of its indebtedness. Subsequently this loan was paid up. The Fishkill Bank also dealt with the banking firm of Wilmerding, Duer & Co., and on the 7th day of June, 1875, Bartow, in his capacity of cashier, took the bonds from the Merchants' Bank, and in the name of the Fishkill Bank, and as its cashier pledged them with that firm as collateral security for the payment of the account of the bank and for further advances to be made to it. In January, 1876, he repossessed himself of the bonds by furnishing other security of the property of the Fishkill Bank, and restored them to the Savings Institute. If nothing more had been done, it is obvious that although a conversion had taken place, for which an action might even then have been maintained, the recovery would have been nominal. But on the 31st of January, 1876, Bartow, as cashier of the defendant, and in its name, and on its account returned the bonds to the banking firm, then doing business under the name of Wilmerding & McCandless, and took back the security which he had put in the place of the bonds. Further advances were made by that firm to the bank in the usual course of business, so that in September, 1876, they owed the firm \$116,568.16, and the latter held as collateral security therefor the bonds in question and other security, amounting in all to \$118,000. The bonds were subsequently sold by this firm or its successor in pursuance of the conditions of the pledge, and the entire proceeds placed to the credit of the National Bank of Fishkill. In all these matters Bartow was acting for the bank, as its managing officer and in its name. He exceeded his authority only when he

appropriated the plaintiff's bonds to the defendant's benefit. It is this which constitutes the conversion on which the plaintiff relies. Undoubtedly he was personally liable for it. The complaint states the conversion to have been by the bank. In support of that averment it is now alleged that the above facts show a conversion by Bartow, the cashier, committed by him in the course of his conduct of the bank's business, and that therefore the cause of action is made out. Such is in effect the finding of the referee. It is in general words "that on January 31, 1876, the bank took from the plaintiff, without its knowledge or consent, and wrongfully converted to its own use, bonds of the par value of \$60,000, but of the value at the time of said conversion of \$70,800." No other finding was made as to any fact relating to it, nor was any request made for further findings. The defendant moved for a non-suit, and by that motion, and an exception to the above conclusion, the question is presented whether the bank is answerable for the cashier's fund. The general rule makes the principal liable for such wrong of the agent as is committed in the course of his employment, and for the benefit of the principal, and this is so, although no express command or privity is proven. *Barwick v. English Joint-Stock Bank*, L. R. 2 Exch. 259. There the manager of the bank had induced the plaintiff to supply J. D., a customer of the bank, with oats on credit, for carrying out a government contract, and to effect this gave the plaintiff a written guarantee that J. D.'s check on the bank in plaintiff's favor, in payment for the oats supplied, should be paid on receipt of the government money, in priority to any other payment "except to this bank." J. D. was then indebted to the bank to the amount of £12,000, but this fact was not known to the plaintiff, nor was it communicated to him by the manager. The plaintiff thereupon supplied the oats to the value of £1227. The government money, amounting to £2676, was received by J. D. and paid into the bank, but J. D.'s check for the price of the oats, drawn on the bank in favor of the plaintiff, was dishonored by the defendant, who claimed to retain the whole sum of £2676 in payment of J. D.'s debt to it. The plaintiff brought an action against the bank for false representation, and it was held that the bank was liable for the fraud of the manager, its agent, and also that in the pleadings it was well described as the fraud of the bank. This was concurred in by all the judges of the Court of Exchequer as within settled principle and adjudged cases. And the case itself is cited with approbation by the judge delivering the opinion in *Mackay v. The Commercial Bank of New Brunswick*, L. R. 5 Privy Council App. 394, and the doctrine above adverted to reiterated, the court saying "there is no distinction between the case of fraud and the case of any other

wrong;" and both cases hold that an action of deceit may be maintained against a company, whether incorporated or not incorporated, in respect of the fraud of its agent. The principle which controlled those decisions, and the cases themselves, are, I think, in point upon the one before us. Bartow possessed himself of the bonds by breach of trust or, as the appellant claims, by theft. It was to aid the bank, and to use them for its benefit. The manager of the bank in the first case cited made use of fraud or false pretenses. The intention and the result were the same in each case. The property of another was obtained wrongfully, and the application of it was the same, to the benefit of the principal. If there is a distinction, it is not other or different from that which is pointed out between larceny and false pretenses, a technical one, affecting the criminal, but not varying the right of the party who has been wronged to compensation or restoration of the property obtained from him. The same doctrine is held in *Johnston v. Southwestern Railroad Bank*, 3 Strobert, S. Car. R. 263. The bank, by the fraud of its agent, obtained certain assets as security for its liabilities through another bank, and it was held that it was bound to make good the representations of its agent, and to answer positively for his acts, and so was bound for the assets in the same manner as if they had been received by itself. To the same effect are the decisions heretofore made by this court. They establish that a corporation is liable for the consequences of its wrongful acts and omissions and for the acts of its agents while engaged in the business of their agency to the same extent and under the same circumstances as natural persons. They illustrate the familiar principle that though a principal is not liable *criminally* for the conduct of his agent, he is responsible *civiliter* for all acts done by him in the course of his employment and bound by his fraud whether he concurred in it or not. For acts wholly foreign to the business in which the agent is engaged the principal is not bound. But that cannot be extrinsic to his employment which is adopted as a means of accomplishing the object of his agency. *N. Y. & N. H. R. R. Co. v. Schuyler*, 34 N. Y. 30; *Holden v. N. Y. & Erie Bank*, 72 *id.* 286. I do not think the case for the plaintiff would be any stronger if the actual concurrence of the directors in the cashier's fraud was established. If they were ignorant of it, it is because they omitted the performance of official duty, and so were not less bound than if the ignorance was intentional, that they or the bank they represent might profit by it. This the law will not tolerate. *Kennedy v. Green*, 3 M. & K. 699. There is indeed evidence which permits an inference that the president of the bank was informed of the use being made of the bonds while they were in pledge to the Merchants' Bank, and sub-

sequently and in January, 1877, that the board of directors were informed of the use which had been made of them through the banking firm, but they neither restored them nor made compensation. This, however, need not be relied upon, for it is apparent that the least degree of that diligence and care to the exercise of which the directors of the bank were bound by the simplest obligation of duty, would have disclosed to them the large outstanding indebtedness of the bank and the means adopted by Bartow to carry it along. The defendant should be treated as if they had made the inquiry and ascertained the fact. *New Hope & Delaware Bridge Co. v. Phoenix Bank*, 3 Comst. 156. Indeed, a direct resolution of the board of directors, leading their cashier's steps in the direction which they took, would be no more convincing of their moral participation in the wrong done than is the indifference and heedlessness to their own duties through which alone he was able to perpetrate the fraud. He was the general manager of the bank, he was to see to its finances, and look to and maintain its credit. Without these, there could be no corporate existence. To secure and perpetuate this was the end pointed out; the means were left to his discretion. In such a case the principal is bound not only as to the end but the means also. *Johnston v. S. W. R. R. Bank*; *Mackay v. Commercial Bank of New Brunswick*; *Barwick v. English Joint Stock Bank*; *Holden v. N. Y. and Erie Bank*, *supra*. It is true he had no authority to commit a fraudulent act; none to take the bonds from the plaintiff. But he had authority to transact the business with the banking firm, in the course of which he disposed of the bonds for the benefit of the defendant, and in prosecuting its business. Then, when he pledged the plaintiff's bonds to secure money, or credit for the defendant, he represented the defendant; for, as we said in the case of *Holden*, *supra*, "the subject matter of his agency was the conduct and direction of the affairs of the bank," and his knowledge of the instrumentality employed was notice to the bank. This is so by the well-established rule, that notice to the agent is notice to the principal. It is objected that the action should have been for money had and received, and not in tort. I am not sure that such an action would have lain; but however that may be, I think this action was well brought. *Beach v. Fulton Bank*, 7 Cow. 485. was trover against the corporation, and it was sustained. Upon principle it should be so. *Yarborough v. Gov., etc., of Bank of England*, 16 East, 6; *Gray v. Pres't, etc., Portland Bank*, 3 Mass. 364. The wrong in this case was committed for the benefit of the defendant. Its purpose was to put the bank in funds, and however Bartow may have brought about the necessity for resorting thereto, its proximate object was to relieve the bank. The bank had

the entire avails of the property converted. Moreover, it ratified and adopted the wrong, when it secured its fruits. *Bennett v. Judson*, 21 N.Y. 238. But if it had been otherwise it would be unjust to the plaintiff to measure its damages by the sum actually received by the defendant, rather than by the value of the property, and to this end again may be cited *Holden v. N. Y. and Erie Bank*, *supra*. "As it (the bank) was at liberty to refuse to take the deposit from him, as it was its duty to decline any advantage thus proffered it, by taking it and receiving the advantage—knowing the transaction to be wrong and fraudulent—it became a party to it, and liable in an action for restoration." These views are an answer to the appellant's position, that a counterclaim should be allowed, for if the action is well brought there could be none. I have, moreover, examined the evidence, and find none which in any form of action would establish it. The evidence warrants the finding of fact made by the referee, and upon that finding the judgment, according to just rules of law, was rendered. I think it should be affirmed, with costs.

All concur.

Judgment affirmed.

THE NEW YORK, LAKE ERIE & WESTERN RAILWAY
CO. *v.* WILLIE HARING, BY HIS NEXT FRIEND.

IN THE COURT OF ERRORS AND APPEALS OF NEW JERSEY, MARCH
TERM, 1885.

[*Reported in 47 New Jersey Law Reports 137.*]

ON ERROR to the Supreme Court.

This case was tried at the September Term, 1884, of the Hudson Circuit Court, before Knapp, J., and a jury, and a verdict rendered for the plaintiff below, Haring, for the sum of \$1000, and judgment being entered thereon, a writ of error was brought to this court.

Cortlandt & R. W. Parker for the plaintiff in error.

R. B. Seymour for the defendant in error.

BEASLEY, Ch. J., delivered the opinion of the court. The injury for which this suit was brought was an alleged unauthorized ejection from a horse railroad car that was running at the time on the road of a corporation known as the Pavonia Horse Railroad. There was evidence tending to show that, at the time in question, the plaintiff in error was using this road and running the cars over it in charge of its own agents, and was receiving the profits

arising from the business; and it was properly left to the jury to find whether such usufruct of such road existed. Nevertheless, the counsel of the defendant below insisted and asked the judge to charge the jury to find against the action even though they should be of opinion that his client was thus engaged in the specified business. The ground assigned was that the plaintiff in error could not legally undertake the employment in question, not having been vested with the requisite franchise, and that consequently it was not, in its corporate capacity, liable for any of the consequences of such employment.

But the doctrine of *ultra vires* does not apply to torts of this nature. It would indeed be an anomalous result in legal science if a corporation should be permitted to set up that inasmuch as a branch of the business prosecuted by it was wrongful, therefore all the special wrongs done to individuals in the course of it were remediless. But in such situations corporate bodies, like individuals, cannot take advantage of their own wrong by way of defense. If corporations are not to be held responsible for injuries to persons done in the transaction of a series of wrongful acts, such an immunity would have a wide scope. All wrongs done by such bodies are, in a sense, *ultra vires*, and if the want of a franchise to do the tortious act be a defense, then corporations have a dispensation from liability for these acts peculiar to themselves.

There does not appear to have been much discussion of this subject, but a case decided by the Supreme Court of Tennessee is directly on the point. The precedent referred to is reported in 53 Tenn. 634, and is entitled *Hutchinson v. Western & Atlantic R. R. Co.* It was an action against a corporation for damages occasioned by the negligence of its employees. It appeared that the railroad company was, without authority, running a line of steamers, and the plaintiff had been hurt by the mismanagement of one of them. The defense of *ultra vires* was interposed in that case, as in the present, but it was rejected on the ground that such doctrine had no application to torts of that character.

This exception¹ cannot prevail.

The judgment is affirmed.

For affirmance—THE CHANCELLOR, CHIEF JUSTICE, DIXON, MAGIE, PARKER, REED, SCUDDER, VAN SYCKEL, BROWN, COLE, PATERSON, JJ.

For reversal—None.

¹ Only so much of the opinion is given as relates to this exception.—Ed.

SALT LAKE CITY v. HOLLISTER, COLLECTOR.

IN THE SUPREME COURT OF THE UNITED STATES, MAY 10, 1886.

[Reported in 118 United States Reports 256.]

Franklin S. Richards for plaintiff in error. *Benjamin Sheeks* and *J. L. Rawlins* were with him on the brief.

Mr. Solicitor General for defendant in error.

MILLER, J., delivered the opinion of the court.

This suit was instituted by the city of Salt Lake to recover of Hollister the sum of \$12,057.75 illegally exacted by him as collector of internal revenue for the district of Utah from the city for a special tax upon spirits alleged to have been distilled by said city, and not deposited in the bonded warehouse of the United States by plaintiff as required by law.

Plaintiff alleges that, under threat of selling sufficient property of the city to pay said tax, it paid the sum demanded under protest, appealed to the Commissioner of Internal Revenue, who failed and neglected to make any decision or to refund the money, and after six months' waiting this suit was brought.

To the petition the defendant made the following answer:

"Now comes the defendant in the above-entitled cause, O. J. Hollister, and for answer to the plaintiff's complaint admits that the plaintiff is a public municipal corporation created and organized under and by virtue of the laws of the Territory of Utah, and that it has continued to be such a corporation since its organization in February, 1850, and that the defendant was at the time mentioned, and as alleged in plaintiff's complaint, and still is, the acting United States collector of internal revenue for the district of Utah.

"Defendant admits that in June, A. D. 1876, the United States Commissioner of Internal Revenue set down to and assessed against the plaintiff a gallon tax of ten thousand seven hundred and sixty dollars upon spirits distilled by said plaintiff at various times between the 2d day of March, A. D. 1867, and the 26th day of August, A. D. 1868, and not deposited in the bonded warehouse of the United States by the plaintiff, as required by law, but denies that said gallon tax was illegally or erroneously set down to or assessed against the plaintiff by said Commissioner of Internal Revenue, and avers that the plaintiff, during all the time for which said assessment was made, was actually engaged in distilling, producing, and dealing in, as distiller, said spirits so assessed, and said assessment of said gallon

tax was made upon distilled spirits actually produced by the plaintiff, and upon which plaintiff had not paid the gallon tax required by law, said spirits not having been deposited in the bonded warehouse of the United States by the plaintiff, as required by law, but taken from said distillery by the plaintiff, after having been produced and distilled as aforesaid, and sold by said plaintiff, and the proceeds of said sale turned into the treasury of the plaintiff.

"Said plaintiff, during all the time it operated said distillery, and especially from said 2d day of March, 1867, to said 26th day of August, 1868, was distilling and producing spirits as aforesaid, and receiving and appropriating the benefit arising therefrom.

"Defendant further alleges that the plaintiff, during the time mentioned in plaintiff's complaint, regularly reported and paid to the collector of internal revenue of the United States the gallon tax due upon a quantity of spirits distilled and produced by plaintiff, but that plaintiff neglected to report all of the spirits it actually produced and distilled, and for and upon which the said gallon tax was due and owing to the United States, and that the tax so assessed as aforesaid is the tax due upon the spirits produced and distilled in excess of the amount so reported by said plaintiff, and upon which no tax was ever assessed and collected up to the time of the payment mentioned in plaintiff's complaint, and hereinafter stated.

"Defendant, answering, admits that the list containing the said gallon tax assessed by the Commissioner of Internal Revenue of the United States was placed in the hands of this defendant as collector of internal revenue.

"And defendant alleges that said plaintiff having engaged in the business of distilling and producing spirits as aforesaid, and said tax having been assessed by the Commissioner of Internal Revenue as aforesaid and placed in the hands of the defendant, as collector of internal revenue, for collection, it became and was his duty as such collector to collect said tax.

"Defendant denies that he knew that said gallon tax, so assessed as aforesaid, was erroneous and illegal, and avers that said tax was legal and correct, and was assessed and collected because plaintiff was liable to said tax.

"Defendant admits that he did threaten to seize and sell the property of plaintiff to pay said tax, as alleged by plaintiff, and that the plaintiff on the 14th day of August, 1877, paid the defendant the amount of the gallon tax, with interest which had accrued thereon from the date of said assessment, but for what reason plaintiff paid defendant said gallon tax defendant is not ad-

vised, and upon that subject has no knowledge, information, or belief, and therefore cannot answer."

A demurrer to the answer was overruled, and the plaintiff refusing to plead further, a judgment was rendered for the defendant, which was affirmed on appeal to the Supreme Court of the Territory.

It will be perceived that this demurrer admitted that the plaintiff, The City of Salt Lake, had been for a period of about eighteen months engaged in the business of distilling and producing spirits and selling the same, and placing the proceeds of the sale in its treasury. That during this time the plaintiff made regular reports as to the quantity produced, and paid the tax on the amounts so reported. But that while it thus operated said distillery, it failed and neglected to report all the spirits which it produced, and the tax assessed and collected, and which the present suit is brought to recover back, was for the spirits of which no report was made.

The Commissioner of Internal Revenue having assessed plaintiff for these distilled spirits and placed the assessment in the hands of defendant, he, as a means of collecting the tax, did threaten to seize and sell property of plaintiff, whereupon plaintiff paid the sum mentioned.

It would seem that this unqualified admission that the city was actually engaged in the business of distilling spirits liable to taxation, and replenishing her treasury with the profits arising from the operation, ought to be a justification of the officer who collected the tax due for the spirits so distilled. And this argument is all the stronger, since the city acknowledged its liability as a distiller by paying voluntarily the tax due on the larger part of the spirits produced.

But while the city does not deny the actual fact of distillation, and of fraudulent returns by it, it denies the whole affair by argument. It says that, though it is very true the city did distil spirits, did sell them, and did receive the money into its treasury, it cannot be held liable for this because it had no legal power to do so. Its want of corporate authority to engage in distilling is to be received as conclusive evidence that it did not do so, while by the pleading it is admitted that it did. Because there was no statute which authorized it as a city of Utah to distil spirits, it could engage in this profitable business to any extent, without paying the taxes which the laws of the United States require of everyone else who did the same thing.

If the Territory of Utah had added to its other corporate powers that of making and selling distilled spirits, then the city would be liable to the tax, but, because it had no such power by

law, it could do it without any liability for the tax to the United States or to any one else.

It would be a fine thing, if this argument is good, for all distillers to organize into milling corporations to make flour, and proceed to the more profitable business of distilling spirits, which would be unauthorized by their charters or articles of incorporation; for they would thus escape taxation and ruin all competitors.

It is said that the acts done are not the acts of the city, but of its officers or agents who undertook to do them in its name. This would be a pleasant farce to be enacted by irresponsible parties, who give no bond, who have no property to respond to civil or criminal suits, who make no profit out of it, while the city grows rich in the performance. It is to be taken as a fair inference on this demurrer that all that the city might have done was done in establishing this business. The officers who, it is said, did this thing, must be supposed to have been properly appointed or elected. Resolutions or ordinances of the governing body of the city directing the establishment of the distillery and furnishing money to buy the plant, must be supposed to have been passed in the usual mode. Everything must have been done under the same rules and by the same men as if it were a hospital or a town hall. If the demurrer had not admitted this, it could no doubt have been proved on an issue denying it.

But the argument is unsound that whatever is done by a corporation in excess of the corporate powers, as defined by its charter, is as though it was not done at all. A railroad company authorized to acquire a right of way by such exercise of the right of eminent domain as the law prescribes, which undertakes to and does seize upon and invade, by its officers and servants, the land of a citizen, makes no compensation, and takes no steps for the appropriation of it, is a naked trespasser, and can be made responsible for the tort. It had no authority to take the man's land or to invade his premises. But if the governing board had directed the act the corporation could be sued for the tort, in an action of ejectment, or in trespass, or on an implied assumpsit for the value of the land. A plea of *ultra vires* in this case would be no defense.

The truth is, that, with the great increase in corporations in very recent times, and in their extension to nearly all the business transactions of life, it has been found necessary to hold them responsible for acts not strictly within their corporate powers, but done in their corporate name, and by corporation officers who were competent to exercise all the corporate powers. When such acts are not founded on contract, but are arbitrary exercises of power in the nature of torts, or are quasi-criminal, the cor-

poration may be held to a pecuniary responsibility for them to the party injured.

This doctrine was announced by this court nearly thirty years ago in a carefully prepared opinion by Campbell, J., in the case of Philadelphia, Wilmington and Baltimore Railroad Co. v. Quigley, 21 How. 202. That was an action for libel by Quigley against the company for the publication of a letter addressed to the company in the course of an investigation by its directors in regard to the conduct of some of its subordinates. This letter contained statements in regard to plaintiff's skill and capacity as a mechanic very disparaging in that respect. This, with much other testimony, was printed and published by the board of directors, and the court decided that the corporation could be held liable for the publication. The argument that only the individuals who ordered the publication could be made responsible was urged then as here, but the court held that if it was a libel the corporation was responsible for it in damages.

It was also insisted that the existence of malice was a necessary element in the action for libel, and that the abstract entity which constituted a corporation was incapable of malice, which could only be predicated of the officers who ordered the publication. This was likewise overruled, and it was held that if the act implied malice, the corporation was liable for it.

The whole question was very fully considered. We can here do no more than make a single extract from the able opinion. After examining the authorities, it was said: "With much wariness, and after close and exact scrutiny into the nature of their constitution, have the judicial tribunals determined the legal relations which are established for the corporation by their governing body and their agents, with the natural persons with whom they are brought into contact or collision. The result of the cases is that for acts done by the agents of a corporation, either *in contractu* or *in delicto*, in the course of its business and of their employment, the corporation is responsible as an individual is responsible under similar circumstances. At a very early period it was decided in Great Britain, as well as in the United States, that actions might be maintained against corporations for torts; and instances may be found in the judicial annals of both countries of suits for torts arising from the acts of their agents, of nearly every variety."

In the case of Reed v. Home Savings Bank, 130 Mass. 443, 445, the bank was held liable to an action for malicious prosecution. The court said: "It is too late to discuss the question, once much debated, whether a corporation can commit a trespass, or is liable in an action on the case, or subject generally to actions for

torts as individuals are. The books of reports for a quarter of a century show that a very large proportion of actions of this nature, both for non-feasance and for misfeasance, are against corporations. . . . And, by the great weight of modern authority, a corporation may be liable, even where a fraudulent or malicious intent in fact is necessary to be proved, the fraud or malice of its authorized agents being imputable to the corporation, as in actions for fraudulent representations, for libel or for malicious prosecution." Many authorities are cited in support of this proposition, which may be found on page 445 of the report of the case.

Another well considered case in which a corporation is held liable for malicious prosecution is that of *Copley v. Grover and Baker Sewing Machine Co.*, 2 Woods, 494.

It is said that Salt Lake City, being a municipal corporation, is not liable for tortious actions of its officers.

While it may be true that the rule we have been discussing may require a more careful scrutiny in its application to this class of corporations than to corporations for pecuniary profit, we do not agree that they are wholly exempt from liability for wrongful acts done, with all the evidences of their being acts of the corporation, to the injury of others, or in evasion of legal obligations to the State or the public. A municipal corporation cannot, any more than any other corporation or private person, escape the taxes due on its property, whether acquired legally or illegally, and it cannot make its want of legal authority to engage in a particular transaction or business a shelter from the taxation imposed by the Government on such business or transaction by whomsoever conducted. See *McCready v. Guardians of the Poor of Philadelphia*, 9 S. & R. 94.

It remains to be observed that the question of the liability of corporations on contracts which the law does not authorize them to make, and which are wholly beyond the scope of their powers, is governed by a different principle. Here the party dealing with the corporation is under no obligation to enter into the contract. No force, or restraint, or fraud, is practised on him. The powers of these corporations are matters of public law open to his examination, and he may and must judge for himself as to the power of the corporation to bind itself by the proposed agreement. It is to this class of cases that most of the authorities cited by appellants belong—cases where corporations have been sued on contracts which they have successfully resisted because they were *ultra vires*.

But, even in this class of cases, the courts have gone a long way to enable parties who had parted with property or money on the

faith of such contracts to obtain justice by recovery of the property or the money specifically, or as money had and received to plaintiff's use. *Thomas v. Railroad Co.*, 101 U. S. 71; *Louisiana v. Wood*, 102 U. S. 294; *Chapman v. Douglass County*, 107 U. S. 348, 355.

The judgment of the Supreme Court of Utah Territory is affirmed.

KIRK E. NIMS *v.* MOUNT HERMON BOYS' SCHOOL.

IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS, NOVEMBER 29, 1893.

[*Reported in 160 Massachusetts Reports 177.*]

D. Malone for the plaintiff.

C. C. Conant for the defendant.

KNOWLTON, J. The defendant is an educational corporation. The plaintiff seeks to recover damages for an injury received through the negligence of a ferryman in managing a boat on which he was a passenger, and which, as he alleges, the defendant was using at a public ferry in the business of carrying passengers for hire. At the request of the defendant, the presiding justice ruled that there was no evidence to warrant a finding for the plaintiff, and directed a verdict for the defendant. The defendant contends that the ruling should be sustained on one or both of two grounds. It says in the first place, that, if it maintained the ferry and hired and paid the ferryman, the business was *ultra vires*, and therefore it is not liable for negligence in the management of the boat. Secondly, it contends that there was no evidence to connect the corporation with the business of running the ferry-boat, or to show that the ferryman was its servant.

It is a general rule that corporations are liable for their torts as natural persons are. It is no defense to an action for a tort to show that the corporation is not authorized by its charter to do wrong. Recovery may be had against corporations for assault and battery, for libel and for malicious prosecution, as well as for torts resulting from negligent management of the corporate business. *Moore v. Fitchburg Railroad*, 4 Gray, 465. *Reed v. Home Savings Bank*, 130 Mass. 443; *Fogg v. Boston & Lowell Railroad*, 148 Mass. 513; *Philadelphia, Wilmington & Baltimore Railroad v. Quigley*, 21 How. 202, 209; *Merchants' Bank v. State Bank*, 10 Wall. 604; *National Bank v. Graham*, 100 U. S. 699; *Gruber v. Washington & Jamesville Railroad*, 92 N. C.

1; *Hussey v. Norfolk Southern Railroad*, 98 N. C. 34. If a corporation by its officers or agents unlawfully injures a person, whether intentionally or negligently, it would be most unjust to allow it to escape responsibility on the ground that its act is *ultra vires*. The only plausible ground on which the defendant in the present case can contend that it should be exempt from liability for the negligence of its servant in managing the ferry-boat is that the contract to carry the plaintiff was *ultra vires*, and therefore invalid, and that the duty for neglect of which the plaintiff sues arose out of the contract, and disappears with it when the contract appears to be void. The defendant may argue that the plaintiff cannot maintain an action for a breach of the contract to use proper care to carry him safely, and that he stands no better when he sues in tort for failure to do the duty which grew out of the contract.¹

In the present case we think it makes no difference that the defendant was not a manufacturing or trading corporation, but was chartered for educational purposes only. It could acquire and hold property, make contracts, and do anything else incidental to the maintenance of the school. Doubtless some of its officers or agents thought it would be an advantage to its students and managers to have a public ferry at the place where the plaintiff was injured. Its maintenance of such a ferry was *ultra vires*, but its acts in that respect were not different in kind from the ordinary acts of corporations in excess of the powers given them by their charter. We are of opinion, therefore, that if the defendant while running the ferry-boat accepted the plaintiff as a passenger to be transported for hire, and undertook to carry him across the river, he was in the boat as a licensee, it owed him the duty to use proper care to carry him safely, and, whether an action could be maintained for a breach of contract or not, it is liable to the plaintiff in an action of tort for neglect of that duty.

The other question in the case is whether there was evidence that the corporation operated the ferry. Under its by-laws the management of the corporation is vested in a board of trustees. It does not appear that any vote was ever taken in regard to the ferry, and it was not shown that any officer of the corporation took out the license which was granted to the defendant by the county commissioners, under Pub. Sts. c. 55, sec. 1, to keep the ferry, but the records of the county commissioners show that such a license was granted, and that a bond with sureties was given to the county of Franklin, with the condition properly to perform the duty of a ferryman, executed in behalf of the defendant by

¹ So much of the opinion as relates to the question of contractual liability has been omitted.—Ed.

one who was designated as superintendent, and witnessed by the defendant's cashier and paymaster. It further appeared that the title to the property used at the ferry was taken by Ambert G. Moody, one of the trustees of the defendant, who was then a student in Amherst College, and that he paid for it only a nominal sum above the mortgage existing upon it, and that he and the defendant's superintendent, who had charge of its farm, employed one Deane to operate the ferry, who was paid by the month, and who turned over the balance of the receipts of the ferry above his wages to the defendant's cashier and paymaster. For the month of April Deane was paid for his services by the defendant's paymaster out of the defendant's funds. In June, 1890, a new ferry-boat was constructed under an arrangement with Ambert G. Moody and Dwight L. Moody, both of whom were trustees of the corporation, and was paid for by the paymaster out of the funds of the corporation. For six months, and until there was a change in the management of the ferry, the defendant's cashier and paymaster sent to the treasurer, who lived in New York, monthly accounts, showing monthly receipts and expenses on account of the ferry. Accompanying the first of these accounts was a statement that the school was running the ferry and paying the bills. The treasurer was himself a trustee of the corporation. He subsequently rendered his official report to the corporation, which was audited by another of the trustees, who did not examine the items in person, but caused the examination to be made by a man in his employment. This report was accepted by the trustees and placed on file. The items of receipts and expenditures were entered on the books of the treasurer in an account under the title "ferry." The treasurer's report was not put in evidence, and was not produced, although the defendant was notified to produce it.

There is no evidence of original authority from the defendant to anybody to operate the ferry on its account, but the evidence is plenary that persons connected with the management of its business assumed so to operate it. The important question is whether there was evidence that the corporation ratified the acts of these persons. We are of opinion that there was evidence from which the jury might have found such ratification. It is not necessary that the ratification should be by a formal vote. It is enough if the corporation, acting through its managing officers, knowing that the business had been done by those who assumed to act as its agents in doing it, and that the income of the business had been received and the expenses of it paid by its treasurer in his official capacity, and that the balance of the receipts above the expenditures was in its treasury, adopted the action of its treasurer, and elected to keep the money. It was a fair inference

of fact, especially when the corporation failed to produce the treasurer's report after notice to produce it, that the report contained a true statement of the accounts which related to the ferry, and that it was accepted with full knowledge on the part of the trustees of what it contained. Whether there was a ratification by the corporation was a question of fact for the jury on all the evidence.

If there was such a ratification, it carried with it the consequences which would have followed an original authority. In *Dempsey v. Chambers*, 154 Mass. 330, it was held, after much consideration, that ratification of an unauthorized act would make the principal liable in an action of tort for an injury resulting from negligence of the agent in doing the act.

We are of opinion that the case should have been submitted to the jury.

CHAPTER VI.

CAPITAL STOCK AND SHARES OF STOCK.

SECTION I.—NATURE OF, AND WHEREIN THEY DIFFER.

THE STATE (A. W. CANFIELD *et al.*, PROSECUTORS) *v.* THE MORRISTOWN FIRE ASSOCIATION.

IN THE SUPREME COURT OF NEW JERSEY, NOVEMBER TERM,
1851.

[*Reported in 23 New Jersey Law Reports 195.*]

THIS cause came into this court on *certiorari* removing an assessment made by the defendants on property within the limits of their association, which the prosecutors contended was illegal.

By an act passed on the 27th of February, 1837 (Pamph. Laws 228), the proprietors of buildings liable to injury by fire, within certain specified limits in Morristown, were constituted a body politic and corporate, by the name of "the Morristown Fire Association." By the second section of the act it is enacted "that the capital stock of said association shall not exceed the sum of two thousand dollars." By a supplemental act passed on the 21st of February, 1840 (Pamph. Laws 55), the association were empowered, at their next annual meeting, and at any subsequent annual meeting, to raise by tax for the objects of said corporation any sum not exceeding five hundred dollars; provided, however, that the capital stock of said corporation shall at no time exceed the sum of four thousand dollars." The association, prior to its last assessment, claiming to act under the authority of the aforesaid acts, had raised by tax more than four thousand dollars, but at the time of the assessment the entire property of the company was worth less than three thousand dollars.

The cause was argued before the CHIEF JUSTICE and CARPENTER, J.

Whelpley for plaintiffs.

J. J. Scofield contra.

The CHIEF JUSTICE delivered the opinion of the court.

The only question presented for consideration is, whether the assessment was authorized by law.

The decision of this question depends entirely upon the true meaning of the phrase "capital stock," as used in the proviso of the first section of the supplemental act. The language of the proviso is, "that the capital stock of said corporation shall at no time exceed the sum of four thousand dollars." This phraseology admits obviously of two interpretations. It may have been designed either as a limitation of the amount authorized to be raised, or as a restriction of the value of the property to be held at any one time by the association.

The phrase "capital stock," as employed in acts of incorporation, is never, that I am aware, used to indicate the value of the property of the company. It is very generally, if not universally, used to designate the amount of capital to be contributed by the stockholders for purposes of the corporation. The amount thus contributed constitutes the "capital stock" of the company. The *value* of the stock may be greatly increased by surplus profits or be diminished by losses, but the amount of the capital stock remains the same.

The funds of the company may fluctuate. Its capital stock remains invariable, save by legislative enactment. This distinction between the value of the property of incorporated companies and their capital stock is perfectly familiar. An instance of the legislative adoption of the terms, in accordance with popular usage, will be found in the supplement to the act concerning taxes, passed the 14th of March, 1851. The fifth section of that act exempts from taxation so much of the property of incorporated companies, represented by the capital stock thereof, as, by virtue of the act, is taxed in the hands of stockholders.

It is clear that the term "capital stock" was used in the original charter of this association to limit the sum to be raised by tax, and that the corporators so understood it. By their petition to the legislature, as set forth in the preamble of the supplement, they represent that they have raised the sum of two thousand dollars, the amount of the capital stock limited by their act of incorporation; and they pray for the passage of an act authorizing the association to assess and raise by tax a further sum. By "capital stock" they obviously understood the sum authorized to be raised by tax, not the value of the property to be held by the company. By well-settled rules of construction, the like interpretation should ~~By well-settled rules of construction, the like interpretation should~~ same subject-matter.

If the clause under consideration be construed as a mere restriction of the amount of property to be owned by the associa-

tion, there is no limitation whatever in the charter of the amount which may be raised by taxation. Whenever and so often as the amount of property owned by the corporation may be reduced below the value of four thousand dollars, new assessments may be made to an indefinite extent. Such a result cannot be supposed to have been within the contemplation either of the legislature or of the members of the corporation. If the case admitted of doubt, this consideration alone should be decisive of the question. So broad a grant of corporate powers should never be raised, except in clear accordance with the manifest intent of the legislature. If, as was suggested upon the argument, the power would be beneficially exercised, the remedy is with the legislature.

The assessment is illegal, and must be set aside.

BLIGH v. BRENT.

IN THE COURT OF EXCHEQUER IN EQUITY, JANUARY 18, 1837.

[Reported in 2 *Younge & Collyer* 268.]

Simpkinson, Creswell and Toller for the plaintiff.

Boteler, Attorney-General, and Prescott White for the defendants.

G. Richards and Stevens for the defendant.

ALDERSON, B., now delivered the judgment of the court.¹ This was a bill praying in substance that the defendant, Margaret Brent, widow and executrix of Timothy Brent, deceased, may account for certain shares of the Chelsea Water-works, and that it may be declared by the court that the plaintiff, as his heir at law, became entitled to those shares, and that the other defendants, the Governor and Company of the Chelsea Water-works, may be directed to insert in their transfer books the plaintiff's name as proprietor thereof. There is no dispute as to the facts, and the only question for the court was, whether these shares were part of the real or personal estate of the testator. If the former, the plaintiff as heir at law is entitled to the decree he prays, because the will is attested by only two witnesses; and if the latter, his bill must be dismissed.

When this question originally came before me I thought it one of so much difficulty, and involving such extensive consequences, that I was desirous the parties should have the benefit of having the opinion of my learned brethren also; and accordingly, in conformity to the practice here (which is a peculiar advantage in the

¹ The statement of facts has been omitted.—Ed.

frame of the Court of Equity in the Exchequer), I adjourned the case to be heard before the full court. The case was, in the course of last Michaelmas Term, very fully and ably argued before Lord Abinger, my brothers Parke and Gurney, and myself, and I am now to deliver the opinion of the whole court on the point.

The Company of the Chelsea Water-works was originally constituted under the provisions of the statute Geo. I., 1723. By that act certain persons named therein were constituted commissioners, undertakers, and trustees, for carrying into effect the works then projected, and for afterward maintaining them. For that purpose his Majesty was, by a subsequent clause, empowered to incorporate them by the name of the Governor and Company of the Chelsea Water-works. And they were to have the power of purchasing lands not exceeding £1000 per annum, and to sell and dispose thereof at their pleasure, and to do all necessary works, and to be subject to such rules, qualifications, and appointments as his Majesty should think reasonable to be inserted in the charter. And might also be empowered to make by-laws from time to time, for the good government of the corporation.

In pursuance of this power a charter of incorporation was granted almost immediately afterward by George the First. That charter followed the directions of the statute, and gave the corporation power to purchase lands, etc., so as they did not exceed in value £1000 per annum, and also estates for life or lives, and for years, and goods and chattels of what nature or value soever, for the better carrying on and effecting the purposes of the company, not exceeding the value of the joint stock of the corporation thereafter mentioned and limited, and to be taken and computed as part thereof.

The twenty-third section empowered the corporation by subscription to raise a joint stock, not exceeding £40,000, and to manage the same from time to time, and to receive the benefit and advantage of the same to the use of them the said governor and company and their successors, according to such shares and proportions as they or any of them have or shall have therein. And then it provided that every person subscribing and contributing any sum or sums of money should, by virtue thereof, become members of the said corporation, and should be entitled to a share or shares in such joint stock (previously fixed at £20 each), equal to the sum or sums of money so by him actually contributed and paid in, and no greater; and should be enabled to sell, assign, and transfer the same or any part thereof (not being less than one whole share, as by a subsequent clause was provided), by transfers in the company's books, in such manner as should be by a

could
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Power
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£40,000

general court directed, or by his last will and testament; and the person to whom such assignment, or transfer, or disposition by last will and testament, should be made, should by virtue thereof become member of the said corporation.

What, then, is the intention of the Crown and legislature to be collected from all these particulars, as to the nature of the interest which each shareholder is to have? That is, in truth, the whole question in this cause. Now, in the first place, we have a corporation to whose management the joint stock of money subscribed by its individual corporators is entrusted. They have power of vesting it at their pleasure in real estate or in personal estate, limited only as to amount, and of altering from time to time the species of property which they may choose to hold; and, in order to give them greater facilities and advantages, certain powers are entrusted to the undertakers by the legislature, and that even before they were constituted a body corporate, of laying down pipes, and thereby occupying land for the purposes of their undertaking. These powers render the use of joint stock by the body corporate more profitable, but they form no part of the joint stock itself; and one decided test of this is, that they be long inalienably to the corporation, whereas all the joint stock is capable expressly of being sold, exchanged, varied, or disposed of at the pleasure of the corporate body. It is of the greatest importance to look carefully at the nature of the property originally entrusted, and that of the body to whose management it is entrusted: the powers that body has over it, and the purposes for which these powers are given. The property is money—the subscriptions of individual corporators. In order to make that profitable, it is entrusted to a corporation who have an unlimited power of converting part of it into land, part into goods; and of changing and disposing of each from time to time; and the purpose of all this is, the obtaining a clear surplus profit from the use and disposal of this capital for the individual contributors.

It is this surplus profit alone which is divisible among the individual corporators. The land or the chattels are only the instruments (and those varying and temporary instruments), whereby the joint stock of money is made to produce profit. Suppose the subscription had not been by the individual corporators, but that strangers having collected the money, had put it into the management of a corporate body having particular privileges, and had, after giving them power to vest the money at their pleasure, stipulated to receive these profits, could it be contended that the nature of the property of the subscribers depended on the mode of management by the independent body? And yet that is, in truth, this case; for the individual members of a corporation are

quite as distinct from the metaphysical body called "the corporation" as any others of His Majesty's subjects are.

This case varies most materially from those which were cited in the argument. In the *New River* case, the individual corporators have the property. The corporation have only the management of it. Lord Hardwicke, in the case in *Atkyns*, expressly puts it on that ground. "They have the legal right," he says; "they may bring an ejectment for so much land covered with water; and the only difference between the shareholders of the king's half and the others is, that the corporation of management have, as to these shares, perhaps, the legal estate in them, the equitable estate being in the individual proprietors. In that case, too, the property given to the corporation was real property, which they are to manage for the good of all. They have no powers of converting it into any other sort of property, but must keep it, and make a profit from it as it is, viz.: as real property.

The same observations apply to *Buckeridge v. Ingram*, the *Avon Navigation*, with this addition, that there the undertakers do not appear to have been a corporation at all. And in both the shares are transferred to the shareholders and their heirs. But here the case is wholly different—the property entrusted is money; the corporation may do what they like with it, and may obtain their profit in any way they please from the employment of their capital stock. If they thought that they could with greater profit supply water by conveying it in carts or the like, they would have a perfect right so to do. It would be strange that the nature of these shares should continually fluctuate, and be sometimes real estate and sometimes personal, according as the corporation in the course of their management should choose to hold real or personal property. Suppose a man made his will attested by two persons, and at a time when the corporation held only personal estate. It is good. He becomes lunatic, or is incapable from age, and then real property is bought by the corporation. Is his will to be set aside? And yet he cannot make another.

Then, in what way has this property always been treated? If we look to the wording of the charter, the language is much more suitable to personal than to real estate. Indeed, on the latter supposition it is very inaccurate. Again, the form of transfer appointed by the legislature (for that which is done under the provisions of the charter is, in fact, done by the legislature, and is, indeed, subsequently recognized by it) is applicable to personal estate only. These shares are not transferred to A. B. and his heirs, but A. B., his executors, administrators, and assigns, and so they have always been. This form, indeed, may be considered as almost a contemporary exposition of the law on this point.

Lastly, in *Weekly v. Weekly*, this point came expressly under the consideration of Sir Thomas Sewell, Master of the Rolls, and he decided that these shares were personal property.

Upon the whole, therefore, we think that the principles of law, the usage of the company, and the distinct authority of one decided case, are sufficient to warrant us in coming to the conclusion that these shares are personal property.

The result is, that the bill must be dismissed with costs.

Decree accordingly.

CHARLES BURRALL, APPELLANT, v. THE BUSHWICK
RAILROAD COMPANY, RESPONDENT.

IN THE COURT OF APPEALS OF NEW YORK, NOVEMBER, 12, 1878.

[*Reported in 75 New York Reports 211.*]

APPEAL from judgment of the General Term of the City Court of Brooklyn, in favor of defendant, entered upon an order reversing an order of Special Term which overruled a demurrer to the complaint, and sustaining such demurrer and directing judgment dismissing the complaint.

The complaint in this action, after setting forth the incorporation of defendant, alleged as follows:

"3. That said defendant, by its authorized officers, did on the 28th day of March, 1868, at the city of Brooklyn, duly issue a paper of which the following is a copy:

"BUSHWICK RAILROAD COMPANY,

"TOMPKINS AVENUE BRANCH.

"BROOKLYN, MARCH 25, 1868.

"This certifies that Charles Foster is entitled to ten (10) shares of the capital stock of the Bushwick Railroad Company, upon surrender of this certificate at the company's office.

"\$1000.

F. W. KALBFLEISH,

"President.

"4. That said paper was duly delivered to the said Charles Foster at or about the date thereof by the said defendant, and that the same came into the possession of this plaintiff by purchase for value, and that this plaintiff is now the lawful owner and holder of the same.

"5. That this plaintiff, by his duly authorized agent, did before the commencement of this action present said certificate at the office of said defendant, in accordance with the terms and

requirements thereof, and did demand the issue and delivery to said plaintiff of the stock therein named from said defendant.

"6. That said defendant refused to comply with the terms of said certificate, and refused to issue and deliver the stock without giving any reason therefor."

The judgment demanded was:

"1. That the defendant be required and adjudged to issue and deliver said stock to this plaintiff in accordance with said certificate and the promise therein contained, and pay to the plaintiff the interest upon the value of the same, to wit, interest on \$1000 from March 28, 1868.

"2. In case of a failure on the part of said company so to do, that the plaintiff have judgment against said company for the said sum of \$1000, with interest as aforesaid.

"3. That this plaintiff have such other and further relief as to the court may seem just, with costs."

Defendant demurred upon the ground that the complaint did not state facts sufficient to constitute a cause of action.

H. C. Place for appellant.

William M. Ivins for respondent.

FOLGER, J. This is an action in which a judgment is asked against a business corporation, that it issue and deliver ten shares of its capital stock to the plaintiff, in accordance with a certificate set forth in the complaint; and pay to him the interest on the value of the same, to wit, \$1000, from March 28, 1868. It is further asked that if the corporation fail so to do, the plaintiff may have judgment against it for \$1000, with interest from the date above named. There is also the prayer for alternate relief.

The defendant has demurred to the complaint, and assigns as cause of demurrer that it does not state facts sufficient to constitute a cause of action.

It is plain that there is no act averred on which a cause of action arises for the payment of interest on the sum of \$1000 from 28th March, 1868; or on any sum, for any length of time. No averment is found in the allegations of the complaint that the shares of stock are of any value. True, in the prayer for judgment it is said "upon the value of the same, to wit, interest on the sum of \$1000;" but that is not an averment of value. True, also, in the copy of the certificate of stock set forth in the complaint there are the character and figures "\$1000"; but they do not make an averment of value; nor is there any averment that there was a duty or obligation on the part of the defendant to pay interest; nor is any fact averred from which such duty or obligation can appear, or be inferred. Nor is there any allegation which will sustain an action to recover \$1000 and interest thereon in

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case the defendant fails to issue and deliver the stock; for, as has been said, there is no allegation that the stock was at any time of any value. The complaint and its averments are reduced, then, to a cause of action to compel the issuing and delivery of shares of stock. If there be a strict interpretation put upon the phrases in the complaint, viz.: "shares of capital stock," "stock therein named," "the stock," "said stock," there is no allegation in the complaint sufficient to sustain an action to compel the issue and delivery of those shares. The phraseology of the complaint has been used in this particular with an inexact notion of what is the capital stock of a business corporation, and what are the shares of that stock; though it would seem to be a matter that at this day should be well understood. A corporation cannot issue and deliver a share of its capital stock. By the joint action of the corporation and the subscriber for its stock, he may become the owner of a given number of shares thereof, but not in such sense as that he may take away those shares out of the common corporate fund. The capital stock is that money or property which is put into a single corporate fund by those who by subscription therefor become members of the corporate body. That fund becomes the property of the aggregate body only. A share of the capital stock is the right to partake, according to the amount put into the fund, of the surplus profits of the corporation; and ultimately, on the dissolution of it, of so much of the fund thus created as remains unimpaired, and is not liable for debts of the corporation. Such a right may be created as above stated. But such a right, that is, such a share, cannot be issued and delivered by a corporation continuing in legal existence, and carrying on the business for which it was formed. A demand that it deliver a share of the corporate fund is to ask of it something which it has not the power to do, and which it will not be compelled to do, by judgment; that is to say, upon the state of facts set up in this complaint. It cannot take from the capital stock, the corporate fund, a part or parts thereof equal in number to the shares or rights therein claimed by the plaintiff, and hand those parts to him; nor can it, on the facts shown by the complaint, now create the right which those shares represent. Those shares are intangible, and rest in abstract legal contemplation. It has been said that they are not a species of property that can be transferred by delivery; and that the assent of the owner to part with it must be expressed in writing. *Davis v. Bk. of England*, 2 Bing. 393; *Dunn v. Com. Bank of Buffalo*, 11 Barb. 580. It is not needful that we say in this case that the rule goes to that extent; the saying is cited to point our remark, that the share itself cannot be issued and delivered as a physical act, which is what the prayer for

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judgment literally taken asks for. What the corporation can do, and what in some circumstances it is compellable to do, is to issue and deliver the written evidence of the existence of such shares, and of the ownership of them—a paper usually called a stock certificate. It is true that the paper set forth in the complaint, as issued by the defendant, declares that Charles Foster is entitled to ten shares of its capital stock on the surrender of that paper. It is possible that that paper was not meant to be what we have called a stock certificate; but an evidence that Foster had subscribed for capital stock, and paid in the amount, and that he was entitled on the surrender of it to a stock certificate. Even then it is inexact, for by the subscription and payment the shares were created, and he became the owner, and entitled to all the rights attainable thereby, and it did not need that he surrender the paper to become so entitled. In rigidity of interpretation then, the complaint shows no state of facts which entitles either Foster or the plaintiff to the issue and delivery of ten shares of the capital stock of the defendant, which is the judgment asked for. We think, however, that it may be safely held for the purposes of this case that the paper is the evidence of the right of Charles Foster to ten shares of stock, as we have defined them; and that the averments of the complaint, and the prayer for judgment, were for the issuing and delivery to the plaintiff of some instrument which will be an evidence and a muniment to him of an assigned right to those shares.¹

We are of the mind, that in any view in which the case can be looked at, that the complaint is too meagre in its statement of facts to show a cause of action in the plaintiff. There are some other considerations which were urged upon us by the respondent, but they need not be considered.

The judgment should be affirmed, and the plaintiff have leave to amend on payment of costs.

All concur, except MILLER and EARL, JJ., absent at argument. Judgment accordingly.

¹ So much of the opinion as relates to this question has been omitted.—ED.

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^{new} CHARLES T. PLIMPTON *et al.*, RESPONDENTS, v. JOHN ^{Penn} BIGELOW, APPELLANT.

IN THE COURT OF APPEALS OF NEW YORK, NOVEMBER 20, 1883.

[*Reported in 93 New York Reports 592.*]

APPEAL from order of the General Term of the Supreme Court, in the First Judicial Department, made January 10, 1883, which reversed an order of Special Term, vacating a levy by virtue of an attachment issued herein. Reported below, 29 Hun, 362.

The facts are sufficiently stated in the opinion.

Samuel Hand for appellant.

Edward Bettens for respondents.

ANDREWS, J. This action is brought by the plaintiffs, residents of Massachusetts, against the defendant, a resident of Pennsylvania, upon several promissory notes of the defendant, made and delivered in Massachusetts and payable generally. The plaintiffs procured an order for the service of the summons upon the defendant by publication, and also a warrant of attachment against his property. The sheriff of the city and county of New York, to whom the warrant was directed, undertook to execute it by levying upon four hundred and thirty-nine shares of the stock of the Hat Sweat Manufacturing Co., a Pennsylvania corporation, incorporated under the laws of that State, owned by the defendant, and for which he held and then had, in the State of Pennsylvania, stock certificates issued and delivered to him at the office of the company in Philadelphia, in February, 1882, at which place the stock and transfer books of the company then were and still are kept. The sheriff, for the purpose of making the levy, left with the secretary of the company, in the city of New York, a certified copy of the warrant of attachment, together with the notice prescribed by sec. 649 of the Code of Civil Procedure. The formal proceedings were taken to complete the levy, and the shares were subjected to the attachment, provided they were liable to attachment under sec. 647 of the Code. That section declares that "the rights or shares which the defendant has in the stock of an association or corporation, together with the interest and profits thereon, may be levied upon; and the sheriff's certificate of the sale thereof entitles the purchaser to the same rights and privileges with respect thereto which the defendant had when they were attached."

The question here is whether this section applies to shares of stock of a foreign corporation. It is to be observed that the sec-

tion is one of the provisions of a system of proceedings by attachment, and is to be construed in view of the fundamental principle upon which all attachment proceedings rest, that the *res* must be actually or constructively within the jurisdiction of the court issuing the attachment in order to any valid or effectual seizure under the process. In the case of tangible property, capable of actual manucaption, it must have an actual *situs* within the jurisdiction. But credits, choses in action, and other intangible interests are made by statute susceptible of seizure by attachment. The same principle, however, applies in this case as in the other—the *res*, that is the intangible right or interest, to be subject to the attachment must be within the jurisdiction. But it is manifest from the nature of this species of property that it must be a constructive or statutory presence only, founded upon some characteristic fact which determines its locality. Where the defendant, who owns a credit, is within the jurisdiction, there is no difficulty through proceedings *in personam*, in reaching and applying it in discharge of his debt to the plaintiff. But where he is out of the jurisdiction, and the debt or duty owing to him, or the right he possesses exists against some person within the jurisdiction, attachment laws fasten upon that circumstance, and by notice to the debtor or person owing the duty or representing the right, impound the debt, duty or right, to answer the obligation which the attachment proceeding is instituted to enforce. In the case supposed the debt, duty, or right, for the purpose of attachment proceedings, is deemed to have its *situs* or locality in the jurisdiction.

The general principle that attachment proceedings can be effectual only against property within the jurisdiction is clearly recognized in the provisions of the Code regulating proceedings by attachment. They authorize the attachment of debts, choses in action, rights by contract, and by sec. 647, shares of the defendant in a corporation, subject, however, to the limitation that the property attached must be within the jurisdiction.

Sec. 641 prescribes that the warrant shall require the sheriff to attach the property of the defendant within his county, and by sec. 644 it is made the duty of the sheriff to execute the warrant by levying upon the property of the defendant within his county.

These provisions leave no doubt of the intention of the legislature to confine the process of attachment within its legitimate limits. They recognize the principle found in the Codes of all enlightened nations, that jurisdiction to be rightfully exercised must be founded upon the presence of the person or thing in respect to which the jurisdiction is exerted, within the territory. Story's Conf. of Laws, §§ 532, 592*a*; Gibbs v. Queen Ins. Co., 63 N. Y. 114; 20 Am. Rep. 513; Street v. Smith, 7 W. & S. 447.

We now come more directly to the inquiry upon which the case now under review depends—namely, whether the shares of a non-resident defendant in the stock of a foreign corporation can be demed to be within this State, by reason of the fact that the president or other officers of the corporation are here engaged in carrying on the corporate business. We do not overlook the fact that we are construing a section of the Code, the language of which is sufficiently general to include foreign corporations, but they are not expressly named, and for the purpose of determining whether foreign corporations were intended to be included, it is a relevant inquiry whether upon general principles the right which a stockholder in a corporation has by reason of his ownership of shares is a debt or duty of the corporation, existing in a foreign jurisdiction wherever the offices of the corporation may be found engaged in the prosecution of the corporate business. If the corporation by having its officers and by transacting business in a State other than its domicile of origin, is deemed to be itself present as an entity in such foreign State, to the same extent and in the same sense as it is present in the State which created it, it may be conceded that its shares might be properly attached in such foreign jurisdiction.

But we regard the principle to be too firmly settled by repeated adjudications of the Federal and State courts to admit of further controversy, that a corporation has its domicile and residence alone within the bounds of the sovereignty which created it, and that it is incapable of passing personally beyond that jurisdiction. *Bank of Augusta v. Earle*, 13 Pet. 519; *Lafayette Ins. Co. v. French*, 18 How. (U. S.) 404; *Merrick v. Van Santvoord*, 34 N. Y. 208; *Stevens v. Phoenix Ins. Co.*, 41 *id.* 150. But it is equally true that a foreign corporation is permitted to sue in the courts of this State, and that suits *in personam* may be brought against it by service of process on its officers or agents within the jurisdiction. Code, §§ 432, 1780; *Gibbs v. Queen Ins. Co.*, *supra*. But suits by or against foreign corporations are not maintained on the theory that the corporation litigant is here in person, or that the corporate entity attends its officers in their migrations from one State to another, or that it is itself present wherever its property may be, or its business may be transacted. The jurisdiction, as I understand, rests upon the ground that as a corporation must act by agents, it may through its agents subject itself to the jurisdiction of a foreign tribunal. This principle was clearly recognized by Curtis, J., in the *Lafayette Ins. Co. v. French*, *supra*, which was an action on a judgment obtained in the State of Ohio against an Indiana corporation by service of process on an agent of the corporation in the former State, and the point was taken

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that no jurisdiction was thereby acquired to render a judgment against the defendant. The court overruled the point, and Curtis, J., after stating that the corporation in that case, existing only by virtue of the law of Indiana, cannot be deemed to pass personally beyond the limits of that State, and that the actual presence in a State of a defendant was not in all cases essential to a judgment against him, said: "The inquiry is not whether the defendant was personally within the State, but whether he or any one authorized to act for him in reference to the suit had notice and appeared, or if he did not appear, whether he was bound to appear or suffer judgment by default." When a foreign corporation sends its agents into another State, or transacts its business there, availing itself of the protection of the laws of such State, there is no just reason why it should not be deemed to have subjected itself through its agents to the jurisdiction of the courts of that State, and be held to respond to an action brought against it therein, upon process served on its representatives.

shares must be within the state | This seems sufficiently plain. But it does not determine the present question. The proceeding authorized by sec. 647 of the Code is not in an action against a foreign corporation or to enforce any contract or liability of the corporation, but a proceeding in an action against a defendant owning shares therein, and where the jurisdiction depends upon the shares which are attached, being within the State. The right which a shareholder in a corporation has by reason of his ownership of shares, is a right to participate according to the amount of his stock in the surplus profits of the corporation on a division, and ultimately on its dissolution, in the assets remaining after payment of its debts. *Burrall v. Bushwick R. R. Co.*, 75 N. Y. 211. It is this right and interest which is made liable to attachment under the section referred to. The right of the shareholder is derived from the corporation under its charter, or the laws of the State which created it. It is enforceable by judicial proceeding in the local courts, and in case of a dissolution of the corporation the local courts alone can be resorted to, to wind up its affairs and distribute its assets. It seems impossible to regard the stock of a corporation as being present for the purpose of judicial proceedings, except at one of two places—namely, the place of residence of the owner, or the place of the residence of the corporation.

Sec. 647 has an appropriate application to shares in domestic corporations. Such corporations are completely subject to the jurisdiction of our courts, and may be compelled to recognize a title to corporate shares derived under proceedings by attachment. In respect to foreign corporations such power does not exist, and it could scarcely be expected that the courts of another State

would recognize a title to corporate stock in one of its own corporations, founded upon a sale under an attachment issued by our courts against a non-resident, when the only semblance of jurisdiction over the property was the service of notice in the attachment proceedings upon an officer or agent of the corporations here. The foreign corporation is not here because its agents are here, nor because it has property here; nor is the stock here because the corporation has property, or is conducting its business in this State. The individual members of a corporation are not the owners of the property of the corporation, or of any part of it. The abstract entity—the corporation—is the owner and only owner of the property. We do not doubt that shares for the purpose of attachment proceedings may be deemed to be in the possession of the corporation which issued them, but only at the place where the corporation by intendment of law always remains, to wit, in the State or country of its creation. In all other places it is an alien. It may send its agents abroad or transact business abroad as any other inhabitant may do, without passing personally into the foreign jurisdiction or changing its legal residence. But such agents are not the corporation, and do not represent the corporation in respect to rights as between the corporation and its shareholders incident to the ownership of shares.

It is not necessary to this case to define the limits of legislative power in subjecting intangible property to attachment by notice served upon such person or corporation as may be designated by the legislature. Manifestly the *res* cannot be within the jurisdiction, as a mere consequence of a legislative declaration, when the actual locality is undeniably elsewhere. But in respect to intangible interests, as we have said, there can be no actual seizure of the thing, and it can be bound only by notice to some one who represents the thing. In case of a debt, notice to the debtor residing within the jurisdiction is the ordinary proceeding to attach the debt, and if the debtor is a corporation, and the corporation is a domestic one, there is no difficulty. But in some of the States foreign corporations having an agent, or a place of business within the State, may be charged under what is called the trustee process, or as garnishee. *Barr v. King*, 96 Penn. Stat. 485; *Natl. B'k v. Huntington*, 129 Mass. 444. In these proceedings the trustee or garnishee is joined with the principal defendant as a party to the action, and the debt owing by the trustee or garnishee is ascertained, and the liability of the trustee and garnishee is adjudged in the action. There may be no difficulty upon principle in compelling a corporation which has an agent and officer in another State, and is transacting business there, to respond in garnishment proceedings for the debt, although the creditor—the princi-

pal defendant—is a non-resident, and if bound to respond it is certainly just that the judgment which compels the corporation to pay the debt to the plaintiff should protect it in making such payment against a subsequent claim by its creditor. We do not enter into this question here. But whatever view may be taken as to the right to attach a debt owing by a foreign corporation to a non-resident by service of notice on an agent of the corporation within the jurisdiction, we think in respect to corporate stock, which is not a debt of the corporation in any proper sense, it would be contrary to principle to hold that it can be reached by such a notice. We are, therefore, of the opinion, that the fundamental condition of attachment proceedings, that the *res* must be within the jurisdiction of the court in order to an effectual seizure, is not answered in respect to shares in a foreign corporation by the presence here of its officers, or by the fact that the corporation has property and is transacting business here, and that sec. 647 must be construed as applying to domestic corporations only. See *Moore v. Gennett*, 2 Tenn. Ch. 375; *Christmas v. Biddle*, 13 Penn. Stat. 223; *Childs v. Digby*, 24 *id.* 26; *Drake on Attachments*, §§ 244, 471, 478. This is decisive of the present case. The right to attach corporate shares depends upon statute. The Hat Sweat Manufacturing Co. was a foreign and not a domestic corporation. Sec. 647 is the only authority for the attachment of shares of a defendant in a corporation, and as that section does not apply to foreign corporations, it is immaterial to what extent the Hat Sweat Manufacturing Co. may have brought its property or business into this State.

We are also of opinion that the defendant was entitled to move to have the levy set aside and vacated, thereby relieving his stock from the cloud and embarrassment created by the proceedings. See *Dunlop v. Patterson Fire Ins. Co.*, 74 N. Y. 145; 30 Am. Rep. 283; *Blossom v. Estes*, 84 N. Y. 617.

These reasons lead to a reversal of the order of the General Term and an affirmance of the order of the Special Term.

All concur.

Ordered accordingly.

SECTION II.—AMOUNT OF CAPITAL STOCK, AND EFFECT OF OVER-ISSUE.

THE DROITWICH PATENT SALT CO., LIMITED, v. CURZON.

IN THE EXCHEQUER, NOVEMBER 11, 1867.

[*Reported in Law Reports, 3 Exchequer 35.*]

SPECIAL CASE stated for the opinion of the court under the Common Law Procedure Act, 1852, § 46.

The plaintiffs are a company originally established in the year 1826, under the name of the "Droitwich Patent Salt Co.," and the defendant is the registrar of joint-stock companies. By the plaintiffs' deed of settlement the capital of the partnership was fixed at £125,000, in 5000 shares of £25 each. The deed provided that eight of the partners should act as managers and have the whole management of the mode of carrying on the company's works and of the affairs of the partnership; that they should make the rules and regulations, and prescribe the orders and directions relating to the concerns of the partnership, and alter and repeal the same, as they in their discretion might think proper, so that the same be not inconsistent with, or repugnant to, the fundamental principles or constitution of the partnership; and that no new rules or regulations in any manner altering the fundamental principles or constitution of the partnership should be binding unless the same should be confirmed by two-thirds of the partners present at two successive extraordinary general meetings, to be specially called for the purpose.

All the 5000 shares were issued, and the full sum of £25 was paid upon each. In 1834 certain alterations were duly made in the rules of the company, and embodied in a supplemental deed of settlement, under which power was given to the managing partners at any general meeting to propose any new rules, and the altering or repealing of any of the laws and fundamental regulations of the partnership. If such new rule or alteration or repeal was carried by a majority of the votes of the partners entitled to vote, and was confirmed by two-thirds of those present at a subsequent extraordinary general meeting, it was to become binding on the partnership.

In 1854, resolutions (which were afterward embodied in a second supplemental deed) were passed, to increase the capital of the company to £150,000 by the issue of 1000 shares at £25 each. The new shares were to be offered at £15 a share, and to rank as old

shares. All these new shares were issued, and the full sum of £15 was paid on each. In 1861 a further increase of capital (under fresh resolutions, which were embodied in a third deed) was made by the issue of 2000 shares at £5 for each £25 share, all of which were eventually issued, and the full sum of £5 paid up on each. Two thousand additional shares, at the same price for each £25 share, were issued in 1863 under similar resolutions, which were embodied in a fourth deed. On all of these, also, the full sum of £5 a share was paid.

The company, therefore, in 1863 possessed a nominal capital of £250,000 in 10,000 shares of £25 each, of which £125,000, £15,000, £10,000, and £10,000 had been paid up. But as the new shares had been issued at reduced prices, no further sum remained unpaid up, and the real capital of the company was £160,000. In 1864 the company was registered under sec. 179 of the Companies Act, 1862, as a company with limited liability, by the name of the "Droitwich Patent Salt Co., Limited." At the time of registration the original and supplemental deeds were registered as the deeds of partnership constituting the company. The statement of capital required by sec. 183 to be delivered to the registrar ran thus: "The amount of nominal capital is £250,000, divided into 10,000 shares of £25 each, all taken up, £25 having been paid on the first 5000 shares, £15 on the next 1000 shares, and £5 on the remaining 4000 shares; and the last 5000 shares were issued at £25 each for the sums above mentioned."

In 1866 the following resolutions were duly passed at an extraordinary general meeting called under the provisions of the original deed of settlement and the first supplemental deed. First, that the capital of the company be altered and reduced. Second, that the capital of the company shall consist of £100,000 divided into 10,000 fully paid-up shares of £10 each. A copy of these resolutions was afterward forwarded to the registrar and recorded by him. Later in the same year resolutions were come to by meetings duly convened for the purpose, enabling the directors, with the sanction of a special resolution of the company, to increase the capital, and subsequently it was resolved that "the capital of the company shall be increased from £100,000 to £125,000, by the issue of 2500 new shares of the nominal value of £10 each. A copy of this resolution was recorded by the registrar, to whom it had been duly forwarded. A notice of this increase was also given to him in conformity with sec. 34 of the Companies Act, 1862. But he, after consideration, refused to record the amount of increase or the notice, alleging as a reason for his refusal, that the company had no power to reduce their capital, and that as such reduction of capital was an illegal act on the part

of the company, he declined to record any document containing a statement of the company's capital being such reduced capital. The plaintiffs subsequently commenced an action against the registrar for the damage they had sustained by reason of his refusal to record the amount of the increase of their capital, and also claimed a writ of mandamus commanding him to record the same. After the issue of the writ in the action, this case was stated without pleadings. The questions for the court were: First, whether the plaintiffs had power to alter and reduce their capital in the manner set forth in the above resolutions lastly referred to, and second, whether the defendant was bound to record the increase of the capital thus altered and reduced.

The 24 and 25 Vict. c. 89, sec. 8, enacts that the memorandum of association of a company formed under the act shall contain, among other things, "the amount of capital with which the company proposes to be registered, divided into shares of a certain fixed amount." Sec. 12 enacts that any company limited by shares may so far modify the conditions contained in its memorandum of association, if authorized to do so by its regulations as originally framed, or as altered by special resolution, as to increase its capital or to consolidate and divide it into shares of a larger amount than existing shares, or to convert its paid-up shares into stock; "but in the conditions contained in its memorandum of association."

Sec. 34 enacts that notice of any increase of capital beyond the registered capital shall be given to the registrar, and he shall forthwith record the amount of the increase. Part 7 of the act regulates the manner in which existing companies are to register under the act.

Sec. 183 enacts that previously to registration, any joint-stock company intending to be registered as a limited company shall deliver to the registrar a statement of "the nominal capital of the company, and the number of shares into which it is divided." Sec. 196 enacts that "when a company is registered under this act in pursuance of this part thereof, all provisions contained in any . . . deed of settlement or other instrument constituting and regulating the company . . . shall be deemed to be the conditions and regulations of the company in the same manner and with the same incidents as if they were contained in a registered memorandum of association and articles of association; and all the provisions of this act shall apply to such company in the same manner in all respects as if it had been formed under this act, subject to the provisions following, that is to say: . . . Sixth, that nothing herein contained shall authorize any company to alter any such provisions contained in any deed of settlement . . . or other instrument constituting or regulating the com-

pany, as would, if such company had originally been formed under this act have been contained in the memorandum of association, and are not authorized to be altered by this act." The section concludes with a proviso, that "nothing herein contained shall derogate from any power of altering its constitution or regulations which may be vested in any company registering under this act in pursuance of this part thereof, by virtue of any deed of settlement or other instrument constituting or regulating the company."

Mellish, Q. C., H. Lloyd with him, for the plaintiffs.

The Attorney-General, F. Herschell with him, for the defendant.

KELLY, C. B. I am of opinion that the defendant is entitled to our judgment. The question whether, under the circumstances of this case, a writ of mandamus might properly be claimed is important, but, as it is unnecessary to decide it, it may be best to express no opinion either one way or the other upon it. The ground on which I consider the defendant entitled to our judgment is this, that his refusal to register the notice of increase of capital was not a wrongful refusal.

The plaintiffs are a company which were in existence long before the passing of the Companies Act, 1862. At the time of the passing of that act, or rather a short time afterward, when they called on the registrar to register them under the act, their nominal capital was £250,000. But this capital was then farther stated to be "in 10,000 shares of £25 each, all taken, £25 having been paid on the first 5000 shares, £15 on the next 1000 shares, and £5 on the remaining 4000 shares;" and it was also stated that the last 5000 shares were issued at £25 each "for the sums above mentioned." This amounts in substance to a declaration that the actual amount of capital had been reduced from £250,000 to £160,000, thus: There had been a new issue of 1000 shares on the original capital of £125,000, at £15 a share, and two subsequent issues of 4000 shares at £5 each. The aggregate amount subscribed was, therefore, £160,000; and this was the real capital of the company, although their nominal capital amounted to £250,000. It is said that the words in the requisition for registration, "the last 5000 shares were issued at £25 each, for the sums above mentioned," amount to a statement that these shares were to be considered as fully paid up. Probably this is so, and at all events the registrar entered the company on the register, whether by inadvertence or otherwise, under the act of 1862, in the manner above described. Subsequently he was called upon to register a further change in the amount of capital. Resolutions were passed reducing the capital to £100,000 in 10,000 fully paid-up shares of £10 each. These resolutions were sent to the registrar

and were recorded by him. In fact, he ought to have refused to record them. He did, however, perhaps *per incuriam*, enter the reduction of capital. Then he was called upon to register an increase of this reduced capital from £100,000 to £125,000. Notice was duly given to him of the proposed increase, but he refused to record the notice or the amount of the increase. Had he done so, then taking all the entries together as representing the constitution and condition of the company, the entry of £125,000 would have amounted, in fact, to an entry, not of an increase, but of a reduction of the nominal capital of £250,000 as originally registered, to £125,000. The question, therefore, really is, whether the company were entitled to reduce their nominal capital, and to call upon the registrar to enter on the register a minute of that reduction?

Now, in the case of a company formed under the act of 1862, and also in the case of a company already formed, which afterward is registered under the act, it is imperative on the registrar to enter on the register the amount of nominal capital. With regard to companies limited by shares formed under the act, sec. 8 enacts that the memorandum of association shall, among other things, contain "the amount of capital with which the company proposes to be registered, divided into shares of a certain fixed amount," and before registration the registrar (who has to give a certificate which is to be conclusive evidence that all the requisites of the act in respect of registration have been complied with) must satisfy himself that the matter to be registered—the memorandum of association—contains all the elements prescribed by the different clauses of sec. 8, and no alteration in any one of these elements can be made unless expressly authorized (sec. 12). The law is the same where an existing company applies for registration. Sec. 183 provides that, previous to registration, a statement of "the nominal capital of the company, and the number of shares into which it is divided," is to be delivered to the registrar, and his certificate of incorporation is to be conclusive evidence (sec. 192), that all the requisitions in the act contained in respect of registration have been complied with. It is quite clear, therefore, that the nominal amount of capital, and the number of shares into which it is divided, must be stated to the registrar, by whom that amount must then be entered on the register.

We next have to consider whether an existing company, when once registered, have any power under the act of 1862 to give effect to a provision contained in their original deed of settlement to reduce their capital. Now, there is an express power given to increase capital (sec. 12), but nowhere can there be found an express provision pointing to a power to reduce, after once the nom-

inal amount of capital has been registered. Is it then the effect of the sixth clause of sec. 196, to enable a company existing before the act, and registering under it, to exercise the power of reducing their capital; or rather, is it the effect of that article to legalize the continuance of a power already possessed under the original deed of settlement or articles of association? The language of the sixth clause is as follows (his lordship read the clause), and as far as that language goes it is not contended that there is anything in it to render lawful a reduction of capital. But there follows a proviso in these terms: "Nothing herein contained shall derogate from any power of altering its constitution or regulations which may be vested in any company registering under this act in pursuance of this part thereof by virtue of any act of Parliament, deed of settlement, etc., constituting or regulating the company." Now, in construing this proviso, I take it that before the word "power" we ought to introduce the word "lawful," and that the proviso means that nothing in the act is to derogate from any "lawful power" before possessed by any company.

Is this power of reduction, then, a lawful power, a power which could be exercised consistently with justice, and with the objects of the act? If it applies, we must remember, to a company where the whole amount on the shares has been paid up, there is no reason why it should not apply to a company where a portion only of the nominal amount registered has been paid up, and the shareholders are liable to contribute for the remainder. Now, it is impossible to contend that a company registered with a nominal capital of £250,000 made up of £25 shares, of which say only £15 or £20 is paid, should have power to force the registrar to register resolutions reducing their capital to the amount actually paid up. If such a proceeding were permitted, the shareholders' liability would be limited not, as was intended, by the amount of their shares, but by the amount of the already paid-up portion of their shares. Justice, the language of the act, and the intention of the legislature, alike forbid an interpretation which would lead to such a result. I, therefore, think that the nominal capital of this company having been registered at £250,000, it was not competent to the plaintiffs to reduce that capital. The registrar should not have registered the resolutions making that reduction, and when he was called on to make a further entry which would have affirmed the previous improper reduction of capital, he was justified in declining to make it. The defendant, therefore, is entitled to our judgment.

BRAMWELL, B., concurred.

CHANNELL, B. I am of the same opinion. The question before us is whether the registrar was bound under the 25 and 26 Vict.

c. 89, sec. 196, to register a notice of the increase of the decreased capital of this company. That depends on whether he was bound to register the resolution stating the previous reduction of capital. Now it is admitted that a new company formed under that act cannot have a reduction in their capital registered, and I see no reason why an old company coming in to share the privileges of the act should be in a better position than a new company. The short ground of my judgment, therefore, is, that whatever powers to reduce capital this company may have possessed under their original deed of settlement, these powers were lost when the company elected to be registered under the act of 1862 in the manner and under the circumstances stated in the case.

PIGOTT, B. I am of the same opinion. I think that the powers of reducing capital, whatever they might have been, which were possessed under the original deed of settlement of this company, were lost upon registration.

Judgment for the defendant.

RAILWAY CO. v. ALLERTON.

IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM,
1873.

[*Reported in 18 Wallace 233.*]

APPEAL from the Circuit Court for the Northern District of Illinois; the case being thus:

The Chicago City Railway Co. was a corporation owning a street railroad in Chicago. The directors of the company, without consulting the stockholders or calling a meeting of them, resolved to increase the capital stock of the company from \$1,250,000 to \$1,500,000. To this one Allerton, who was a stockholder, objected, and filed a bill praying for an injunction to prevent the increase. His position was that it could not be lawfully made without the concurrence of the stockholders, and in support of this view he relied upon the Constitution of Illinois, adopted in July, 1870, by the thirteenth section of the eleventh article of which it is declared as follows:

"No railroad corporation shall issue any stock or bonds, except for money, labor, or property actually received and applied to the purposes for which such corporation was created, and all stock dividends, and other fictitious increase of the capital stock, or indebtedness of any such corporation shall be void. The capital stock of no railroad corporation shall be increased for any pur-

pose, except upon giving sixty days' public notice in such manner as may be provided by law."

He also relied on an act of the legislature of Illinois, passed March 26, 1872, to execute and carry out the above provision of the Constitution, by which, among other things, it was enacted that no corporation should change its name or place of business, increase or decrease its capital stock, or the number of its directors, or consolidate with other corporations, without a vote of two-thirds of the stock at a stockholders' meeting.

The railway company, in its answer, relied upon its charter, granted February 14, 1859, the third and fourth sections of which were as follows:

"Sec. 3. The capital stock of said corporation shall be one hundred thousand dollars, and may be increased from time to time, at the pleasure of said corporation.

"Sec. 4. All the corporate powers of said corporation shall be vested in and exercised by a Board of Directors, and such officers and agents as said board shall appoint."

The position of the company was that the third section conferred an unrestricted right to increase the capital stock at will, and that the fourth vested this power in the board of directors, and that the constitutional provision and act above referred to, if applied to this corporation, would impair the validity of the contract. It was further set up, however, that the said provision did not apply to railways worked by horse-power. The court below decreed in favor of the complainant and the company took the present appeal.

Charles Hitchcock for the appellant.

E. A. Storrs contra.

BRADLEY, J., delivered the opinion of the court.

Without attempting to decide the constitutional question, or to give a construction to the act of the legislature, we are satisfied that the decree must be affirmed on the broad ground that a change so organic and fundamental as that of increasing the capital stock of a corporation beyond the limit fixed by the charter cannot be made by the directors alone, unless expressly authorized thereto. The general power to perform all corporate acts refers to the ordinary business transactions of the corporation, and does not extend to a reconstruction of the body itself, or to an enlargement of its capital stock. A corporation, like a partnership, is an association of natural persons who contribute a joint capital for a common purpose, and although the shares may be assigned to new individuals in perpetual succession, yet the number of shares and amount of capital cannot be increased, except in the manner expressly authorized by the charter or articles of association.

Authority to increase the capital stock of a corporation may undoubtedly be conferred by a law passed subsequent to the charter; but such a law should regularly be accepted by the stockholders. Such assent might be inferred by subsequent acquiescence; but in some form or other it must be given to render the increase valid and binding on them. Changes in the purpose and object of an association, or in the extent of its constituency or membership, involving the amount of its capital stock, are necessarily fundamental in their character, and cannot, on general principles, be made without the express or implied consent of the members. The reason is obvious.

First, as it respects the purpose and object. This may be said to be the final cause of the association, for the sake of which it was brought into existence. To change this without the consent of the associates, would be to commit them to an enterprise which they never embraced, and would be manifestly unjust.

Secondly, as it respects the constituency, or capital and membership. This is the next most important and fundamental point in the constitution of a body corporate. To change it without the consent of the stockholders would be to make them members of an association in which they never consented to become such. It would change the relative influence, control and profit of each member. If the directors alone could do it they could always perpetuate their own power. Their agency does not extend to such an act unless so expressed in the charter, or subsequent enabling act; and such subsequent act, as before said, would not bind the stockholders without their acceptance of it, or assent to it in some form. Even when the additional stock is distributed to each stockholder *pro rata*, it would often work injustice, because many of the stockholders might be unable to take their respective shares, and might thus lose their relative interest and influence in the corporate concerns.

These conclusions flow naturally from the character of such associations. Of course the associates themselves may adopt or assent to a different rule. If the charter provides that the capital stock may be increased, or that a new business may be adopted by the corporation, this is undoubtedly an authority for the corporation (that is, the stockholders) to make such a change by a stockholders' vote, in the regular way. Perhaps a subsequent ratification or assent to a change already made would be equally effective. It is unnecessary to decide that point at this time. But if it is desired to confer such a power on the directors, so as to make their acts binding and final, it should be expressly conferred.

Where the stock expressly allowed by a charter has not been all subscribed, the power of the directors to receive subscriptions for

the balance may stand on a different footing. Such an act might, perhaps, be considered as merely getting in the capital already provided for the operations and necessities of the company, and, therefore, as belonging to the orderly and proper administration of the company's affairs. Even in such case, however, prudent and fair directors would prefer to have the sanction of the stockholders to their acts. But that is not the present case, and need not be further considered.

Decree affirmed.¹

Rowley

EDWIN EINSTEIN, APPELLANT, *v.* THE ROCHESTER GAS AND ELECTRIC CO. *et al.*, RESPONDENTS.

IN THE COURT OF APPEALS OF NEW YORK, APRIL 30, 1895.

[*Reported in 146 New York Reports 46.*]

APPEAL from an interlocutory judgment of the General Term of the Supreme Court in the Fifth Judicial Department, entered upon an order made March 27, 1894, which reversed an order of Special Term sustaining a demurrer to the complaint.

On defendants' demurrer to the complaint.

This action is to compel the defendant, the Rochester Gas and Electric Co., to issue to the plaintiff \$480,000, par value of its paid-up stock; or, in default thereof, that the defendants be required to pay to him the par value thereof.

The plaintiff's assignor, Rowley, became the owner through a contract with the Brush Electric Co., of Cleveland, Ohio, of the exclusive right to sell dynamo electric machines and apparatus made under the Brush patent for electric lighting and electroplating. Rowley agreed with certain persons in the city of Rochester respecting the organization of a stock company, with a capital of \$100,000, for the purpose of introducing the Brush electric light into that city. By the agreement forty-eight per cent. of the capital stock of the company was to be paid over to Rowley, as a consideration for an assignment by him of his rights under the Cleveland contract, and, also, forty-eight per cent. of any increase of the capital of said company. After the formation of the Rochester company, under the name of the Brush Electric Light Co. of Rochester, N. Y., one of the defendants in this action, a formal agreement was executed between that company and Rowley, through which Rowley assigned to it his rights under the Brush

¹ As to the power to change the amount of capital stock, see further. *infra*, pp. .—Ed.

patent for Monroe County. The contract contained this agreement on the part of the company (after having recited the issue and delivery to him of \$48,000 of paid-up capital stock as a consideration for the assignment), viz.: "That if at any time hereafter the said capital stock of the said party of the second part shall be increased (otherwise than for stock issued for cash paid therefor at the time of such issue at par to the extent of one hundred thousand dollars [\$100,000] in addition to the present capital) forty-eight per centum of the par value of such increase shall be issued and delivered to said party of the first part, or his assigns, full paid up. . . . And the said party of the second part for itself, successors and assigns, covenants, promises and agrees to and with said party of the first part, his successors and assigns, that in case at any time hereafter the capital stock of said party of the second part shall be increased (otherwise than for cash paid for the said increase at the time at par to the extent of one hundred thousand dollars [\$100,000] in addition to the present capital), that then and in that case said party of the second part will issue and deliver to the said party of the first part, his successors or assigns, forty-eight per centum, in amount, of the par value fully paid up, of such increase as a part of the consideration for this assignment. . . . It is expressly agreed between the parties hereto that the party of the second part shall not sell or dispose of any of its interests, franchises or rights under this contract without the consent of the party of the first part, or his assigns, in writing. This agreement shall not, however, prevent any stockholder from disposing of his stock if he elect so to do." It was subsequent to the making of this latter agreement that the plaintiff became possessed, by assignment, of Rowley's interest and rights under the various agreements. Subsequently, with the plaintiff's consent, there was an increase of its capital stock to the extent of \$150,000 in cash, in addition to the \$100,000 stated in the contract between the company and Rowley; thus making the whole capital stock of the company \$250,000. Some years later a consolidation was proposed between the Brush Co. and two other electric light companies in that city and the Rochester Gas Co. This project of consolidation, however, was abandoned, because of the inability to secure the plaintiff's waiver of his right to forty-eight per cent. of an increase in the stock of the Brush Co. of Rochester under his contract; such increase being desired in the capital stock of all the four companies upon consolidation. Thereupon, the Rochester Gas Co. and the two other electric-light companies of Rochester consolidated into a single corporation, called the Rochester Gas and Electric Co., the present defendant, with a capital stock divided into forty-three thousand shares of \$100. Of this stock a cer-

tain amount was apportioned to the stockholders of each of the consolidating companies, and there were retained in the treasury of the consolidated company twelve thousand five hundred shares, which the directors were authorized to issue in the purchase of not less than a two-thirds interest in the capital stock of the Brush Co., at the rate of five shares of the stock of the consolidated company for one share of the Brush Co. In pursuance of this plan the new company acquired all of the Brush Co.'s stock in exchange for the twelve thousand five hundred shares at the rate mentioned. The Rochester Gas and Electric Co., in this way, acquired the control of the Brush Co. and the practical ownership of all its properties; but the corporate organization of the Brush Co. has been kept up, with a Board of Directors and with officers, although the persons constituting the Board of Directors are also directors of the consolidated corporation.

These facts appear in the complaint of the plaintiff, and his claim is that, to all intents and purposes, the Rochester Gas and Electric Co. is the Brush Co., and that, through the process by which the shares of the stock of the Brush Co. were acquired by the Rochester Gas and Electric Co., the capital stock of the former company was virtually increased by just \$1,000,000, and that the directors and stockholders of the Brush Co. have, by indirect means, effected an increase of the capital stock of the company with the view of preventing his assertion of a claim under his contract to receive forty-eight per centum of any increase of the capital stock.

A demurrer to the complaint, on the ground that it does not state facts sufficient to constitute a cause of action, was overruled at the Special Term and judgment ordered thereon for the plaintiff. Upon appeal by the defendants to the General Term, that court reversed the judgment of the Special Term; but gave leave to the plaintiff to appeal to this court from the interlocutory judgment of reversal.

George F. Danforth for appellant.

Edward Harris for respondent.

Per curiam. In the view that we take of this case, it is unnecessary to consider the appellant's argument as to the rights gained through his contract with the Brush Co., otherwise than with respect to the question of whether there has been an increase of the capital stock of that company. Assuming all that he claims in regard to his absolute right under the contract to receive forty-eight per cent. of any increase of the capital stock, we do not think it can be said that there has been any such increase effected through the transactions referred to. It may be perfectly true that the transaction with the Rochester Gas & Electric Co., by which

that company acquired all of the stock of the Brush Co., at the rate of five shares of the former for one of the latter, was a device adopted by the officers and stockholders of the latter company to accomplish by indirect means what could not be done directly, because of their inability to secure the appellant's consent, or to agree upon terms with him. But it was a possible transaction and one which the contract did not contemplate or provide for. The language of the contract is explicit with respect to what the company agreed to do, and that is "that in case at any time hereafter the capital stock . . . shall be increased, . . . that then in that case said party of the second part (the company) will issue and deliver to the said party of the first part (Einstein's assignor) . . . forty-eight per cent. . . . of such increase." No condition of things will meet that provision, unless there be, in fact, as in law, an increase of the capital stock. Now the capital stock of the Brush Co., which was \$250,000, is to-day \$250,000, and it is only by regarding the holdings by the former stockholders of the Brush Co. of the shares of capital stock of another company, to wit, The Rochester Gas and Electric Co., that it can be supposed that the capital of the company is larger, as the result of the transactions complained of, than it was before. But that notion is quite untenable. There is but one way by which the capital stock of a company can be increased, and that is in the manner authorized by its charter, or by some express authorization of the legislature of the State. No acts of the officers or agents of the company are competent to enlarge the capital stock; nor can the stockholders do so, save in the particular manner pointed out by the statute. There is no such thing as an implied authority to increase or diminish the capital stock of a company. The transaction in this case was simply one whereby all the stockholders of the Brush Co. have parted with their stock to the Rochester Gas and Electric Co., upon certain terms which had been recommended by the directors. The appellant's agreement forbade the company from selling any of its interests or rights without his written consent; but it expressly recognized and preserved the right of any stockholder to dispose of his stock if he so elected. The Rochester Gas and Electric Co. had the right to purchase, and the consequence was that it became a stockholder in the Brush Co. in the place of those who, by transfers of their stock, had ceased to be stockholders therein. But that has no effect upon the Brush Co.'s stock, except to change the ownership; and that the Brush Co. is to-day a distinct and existing organization, with its own officers and Board of Directors, and with a capital stock of \$250,000, is an indisputable fact and is conceded. The argument of the appellant, that the proceedings through which the Rochester Gas and Elec-

tric Co. was formed, and through which it subsequently acquired all of the stock of the Brush Co., "transmuted the stockholders of the Brush Co. into stockholders of the Rochester Gas and Electric Co.," may be perfectly true; but the stock of the Brush Co. never changed in form or amount. All that took place was a change of its ownership.

If it is true, as alleged in the complaint, that the Rochester Gas and Electric Co. has "completely absorbed" the Brush Co. and is infringing upon any of its rights, by the use of the patents which were assigned to it; or if it is, in other legally appreciable ways, violating any of its corporate rights, then the appellant, if his contract with the company gives him such an interest in the corporation and such a standing in court as to enable him to assert his rights, or the rights of his company, is not precluded from seeking relief in a proper action. Whether his having ceased to be a stockholder (and he disclaims here any right of action in that character) affects his capacity to bring such an action, in assertion of the corporate rights of the Brush Electric Co., is a serious question about which grave doubts may be entertained, but which we are not called upon now, and which we do not undertake, to decide. The appellant's action must fail, if there has not been that increase of capital stock which his contract contemplated and provided for, and, as we think that no such change was effected by the transactions set forth in the complaint, it follows that the judgment of the General Term, which reversed the interlocutory judgment overruling the demurrer of the defendants to the complaint, was correct and should be affirmed, with costs to the respondent; but with leave to the plaintiff to amend his complaint within twenty days after service upon his attorneys of a copy of the order entered upon our remittitur.

All concur, except BARTLETT, J., not voting, and HAIGHT, J., not sitting.

Judgment accordingly.

THE NEW YORK AND NEW HAVEN RAILROAD COMPANY *v.* ROBERT SCHUYLER AND OTHERS.

IN THE COURT OF APPEALS OF NEW YORK, JUNE TERM, 1865.

[Reported in 34 New York Reports 30.]

THIS is an action in the nature of a suit in equity against Robert Schuyler and several hundred other defendants.¹ The complaint was sustained by this court on demurrer, as will appear by

¹ Neither the statement of facts nor the opinion given in full.—Ed.

reference to the reported case in 17 N. Y. 592. The object of the complaint was to have a large number of alleged false and fraudulent certificates and transfers of pretended stock of the company, made by Schuyler and charged to be held by the defendants, adjudged spurious and void; and to compel the certificates to be brought into court and canceled; and to enjoin the several defendants from further prosecuting actions then pending, and from bringing suits against the company to enforce such certificates and transfers, or to recover damages for any reasons connected therewith. . . .

The particular facts of individual cases, or classes of cases, are stated so far as necessary in the course of the opinion. The general facts as found by the court on the trial, as they appear from the pleadings and case, are in substance as follows:

That the plaintiffs were duly incorporated by the legislature of the State of Connecticut in 1844; and by an act of the legislature of this State, passed in 1846, were authorized to extend their road into this State, and clothed with necessary powers for conducting its business in this State; that the act of incorporation provided that the capital stock of the company should be two millions of dollars, with the privilege of increasing the same to three millions, to be divided into shares of one hundred dollars each, which shares should be deemed personal property and be transferred in such manner and in such places as the by-laws of said company should direct; and that the directors should have full power to make and prescribe such by-laws, rules, and regulations as they should deem needful and proper touching the disposition and management of the stock, property, estate and effects of the said company, the transfer of the shares, the duties and conduct of their officers and servants, the election and meetings of the directors, and all matters whatsoever which might appertain to the concerns of said company.

That the original corporators failed to obtain subscriptions for stock sufficient to organize the company till 1846. That on the 19th of May, 1846, a board of directors was elected, who organized their body on the same day by electing Robert Schuyler president, which office he continued to hold till his resignation thereof July 4, 1854. That on the 9th of July, 1846, the board of directors established by certain by-laws adopted by them a system concerning the transfer of stock of the company and the issuing of certificates therefor, according to which stocks were transferable only on the books of the company by the shareholder or his attorney duly appointed, and on the surrender of the certificate held by him when any certificate had been issued. The same by-laws prescribed the form of the transfer, as follows:

New York and New Haven Railroad Company.

NEW YORK AND NEW HAVEN RAILROAD COMPANY.
No. 10,002.
Capital, \$3,000,000. Shares \$100 each.
New York Office.
For value received hereby assign and transfer
unto all right, title, and interest in shares
in the capital stock of the New York and New Haven Rail-
road Company.
NEW YORK,, 18..

And transfer books were provided for the use of the agents, in
which transfers of this form were printed in blank; and the by-
laws also directed that a form of stock certificate should be adopt-
ed; and one was adopted and invariably used, as averred by the
complaint, for the purpose of facilitating transfers of stock by the
holders thereof, with a blank assignment and power of attorney
printed upon the back of it as follows:

New York and New Haven Railroad Company.

NEW YORK AND NEW HAVEN RAILROAD COMPANY.
No. 5,294.
Capital \$3,000,000. New York Office. Shares \$100 each.
Be it known, that entitled to shares of
the capital stock of the New York and New Haven Railroad
Company, transferable on the books of the company, at its
office, in the city of New York, by the said or
.... attorney, on the surrender of this certificate.
NEW YORK,, 18..

....., Transfer Agent.
Know all men by these presents, that, for value re-
ceived, ha.. bargained, sold, assigned and transferred, and
by these presents do bargain, sell, assign and transfer unto
..... of shares in the capital stock of the
New York and New Haven Railroad Company, standing in
..... name on the books of the said company, and trans-
ferable only at its office in the city of New York. And
do hereby constitute and appoint true and lawful
attorney irrevocable, for and in name and stead,
but to, use, to sell, assign, transfer and set over all or any
part of the said stock; and for that purpose to make and exe-
cute all necessary acts of assignments and transfer, and one
or more persons to substitute with like full power, hereby
ratifying and confirming all that said attorney or
substitute or substitutes shall lawfully do by virtue hereof.

In witness hereof .. hereunto set .. hand and seal, the ..
day of, one thousand eight hundred and fifty

Sealed and delivered in the presence of

These certificates, with the blank assignment and power of attorney upon them, were printed and bound in books, with margins for entering the time of issuing the certificate, the number of shares, the number of the certificate, and to whom issued; which margins remained bound in the books after the certificates were cut out and issued, and constituted a memorandum of all the certificates issued; these books were furnished by the company to the transfer agents. A stock ledger was also kept, in which each stockholder was credited with the shares transferred to him and debited with those transferred by him, and in a separate column in each stockholder's account was entered the number of shares represented by each certificate issued to him and the number of the certificate, and when a certificate was surrendered a line was drawn through this entry, so that the uncanceled charges in the certificate column indicated the amount of each stockholder's stock represented by outstanding certificates, and by a comparison of the aggregate of such charges with the aggregate balances of every stockholder's account, any over-issue of certificates would be made to appear. These books were not accessible to the public, and dealers in stock had no means of information as to the title of parties proposing to dispose of stock, except such as was furnished by the certificates above mentioned or by the agents of the company.

That on the 3d day of February, 1847, Robert Schuyler was appointed transfer agent of the company at the city of New York, and a transfer office was established in that city; other offices and agencies were also established in the cities of Boston and New Haven. From that time forward to and including July 3d, 1854, the entire control and management of the transfer office and agency at New York was left in the hands of said Schuyler, without any examination or interference on the part of said company or its directors, he being also, during the whole period, the president of the company and one of its directors (and the meetings of the board of directors appear from the minutes to have been held at his office in New York).

That in August, 1851, the board of directors resolved to fill up the capital stock to \$3,000,000, being 30,000 shares, and directed that the same be apportioned amongst the existing shareholders as then standing on the stock ledger; such distribution was made, and the stock (except 68 shares not taken, which remained in part undisposed of till October 15, 1849) was taken by such distributees; that the stock originally subscribed and that afterwards distributed was, in most cases, transferred on behalf of the company by one of the transfer agents to the person entitled, and certificates were issued by such agent in the form above set forth;

that during the time Schuyler was such agent, transfers of stock were made on the books of the transfer agents on account of the company, and such stock afterwards disposed of by such agents; that Robert Schuyler was a member of the firm of R. & G. L. Schuyler; that said firm held large amounts of the stock of the company, and from its organization to July 3, 1864, were large and constant dealers therein, and Robert Schuyler, as transfer agent during this whole period, attended to transfers and issued certificates to them in the same manner that he did of stock standing in the names of other persons, and no restriction appears at any time to have been put by the company upon his official action toward or with his said firm.

On the first day of February, 1848, Robert Schuyler, as such transfer agent, commenced the over-issue of certificates to his said firm, and on that day such over-issue was sixty shares; and such over-issue continued thenceforth, and at all times thereafter there was an over-issue of certificates in the stock account of R. & G. L. Schuyler. On the 20th of March, 1848, the over-issue by transfer commenced, and on that day the number of shares transferred by R. & G. L. Schuyler exceeded the number transferred to them by sixty shares. Such excessive transfers continued till January, 1849, the amount thereof fluctuating from time to time as transfers were made to and by R. & G. L. Schuyler, but the balance on the books of the company was against them at all times during that period. The excessive issues of such stock so transferred on the books of the company by R. & G. L. Schuyler were credited to the transferees in their respective accounts, and when retransferred were charged in such accounts and credited to the new transferee. These transfers were made in great part under the power of attorney executed in blank by R. & G. L. Schuyler, endorsed on the over-issued certificates by the holders thereof, and such certificates were, on making such transfers, brought in, surrendered and cancelled. During this period the amount of the over-issued certificates and over-issued transfers was not in excess of the 30,000 shares of the authorized capital of the company.

On the 10th of January, 1849, the excessive transfers amounted to 1191 shares, but between that day and the 31st of January shares were transferred to R. & G. L. Schuyler by various persons, sufficient to turn the balance of transfers in their favor. In August, 1851, when the 5,000 additional stock was distributed, the firm of R. & G. L. Schuyler had standing to their credit 854 shares; and in making the distribution and dividend in that month the stocks previously transferred to the various persons holding the over-issued certificates were treated by the company as gen-

uine stock; there was at this time outstanding certificates issued to that firm, beyond the amount of their credits, for 1277 shares; that the over-issued certificates continued to increase till October 17, 1853, at which time it had reached 7042 shares, but the number of incoming certificates up to that time had not exceeded the credits of R. & G. L. Schuyler by transfers made to them, so that on the 17th of October, 1853, their account showed a balance by transfer to them of four shares. On that day a transfer of 100 shares was charged to them, and thenceforward to and including July 3, 1854, the balance of transfers against them continued to increase until it reached 17,497 shares, and at the same date the outstanding certificates against them amounted to 1648 shares. All the certificates issued, including the false and over-issued certificates, were regularly entered in numerical order in the certificate books and stock ledger, and an examination of such books would at all times have shown what certificates were outstanding, and a comparison between the footings of the several books would have shown whether R. & G. L. Schuyler were or were not entitled to receive certificates.

The over-issued certificates and transfers were, in all cases in which judgments have been given to defendants, purchased or received by them in good faith on the payment or advance of money. It was an established usage in the city of New York to make purchases of stock and make loans thereon on the faith of such certificates, with the assignment and power of attorney thereon executed in blank by the party to whom originally issued, and they were transferred in the course of business from hand to hand by delivery. It was a usage also to take transfers of stock in the course of dealing on the books of the corporation without receiving a certificate; and according to the ordinary mode of business transfers were not allowed by corporations without the surrender and cancellation of the outstanding certificate when one had been issued; and according to the usage among corporations in New York, dealers in their stock were not allowed access to their books, and it was not the custom for dealers to make examinations thereof. That the stock of the New York & New Haven Railroad Company was largely dealt in, in the city of New York, by the delivery of certificates and assignments in blank, and large amounts of such certificates were constantly in circulation and many of them purported to be issued to R. & G. L. Schuyler, and were signed by Robert Schuyler as transfer agent.

In many cases where valid certificates of stock had been issued to R. & G. L. Schuyler for stock actually belonging to them and outstanding to their credit on the books at the time, and while such certificates, with the usual assignments and powers of attor-

ney executed in blank were outstanding in the hands of *bona fide* holders, the stock was permitted to be transferred by R. Schuyler in the firm name to other persons, who took the same for value in good faith, without the surrender of the outstanding certificates. The rule on this subject, as established by the by-laws, was generally observed, but in the case of R. & G. L. Schuyler and a few other persons it was disregarded by R. Schuyler and the clerks of his office.

That the railroad company kept no bank account for the deposit of moneys; that money received on behalf of the company on construction account from time to time by Robert Schuyler, as president or transfer agent, was, from time to time, deposited by him in the bank accounts of the firm of R. & G. L. Schuyler, and when payments were made by Schuyler on behalf of the company the money was obtained by R. Schuyler; that large amounts were so obtained from time to time, and frequently from the firm of R. & G. L. Schuyler; that said moneys were drawn out from time to time, as needed on their checks; that the money so obtained by R. Schuyler was raised by the said Robert Schuyler in the name of his said firm of R. & G. L. Schuyler indiscriminately on genuine and spurious certificates of the stock of said company; but it is not found to what time such moneys continued to be raised.

The firm of R. & G. L. Schuyler failed July 3, 1854, and R. Schuyler, on the morning of the 4th of July, by letter, resigned the offices of president, director and transfer agent, and called the attention of the board of directors to the over-issues appearing in the books. It is also found by the court that up to that time "there was no evidence of any actual knowledge by any of the other directors of any fraudulent acts on the part of Schuyler in the performance of his duties as transfer agent," and the evidence tended to establish that he stood high in the confidence of the community as a man of integrity and business capacity; but the court further found "that a proper examination of the books by the directors would have enabled them to discover the frauds which were perpetrated by Schuyler, and that the board of directors was guilty of negligence in not making such examination, and in leaving the entire charge and control of the transfer of shares and giving of certificates with Schuyler without making such examinations," and that the plaintiffs, by their transfer agent or clerks, carelessly, negligently and improperly conducted, in relation to the transfer of the stock on the books of the company and the issuing of certificates therefor, in the allowance of transfers of shares of stock on the books of the company and in issuing certificates therefor when no such shares existed, or when such certificates were not true, and in permitting transfers of

spurious stock to be made on the books of the company and certificates of spurious stock to be issued to persons who, in good faith, advanced money or other property thereon, and in permitting shares of stock to be transferred to other persons than those holding the certificates thereof without requiring a surrender of such certificates."

"That the defendants received their transfers of stock through the acts and neglect of the transfer agent, or of the officers of said company, or certificates issued by the acts and neglect of the transfer agent and officers of the company, or certificates of stock valid when issued, but rendered valueless by the fraudulent or negligent pursuance of transfers of such stock to subsequent *bona fide* purchasers without the surrender of the outstanding certificates; and have been misled by the acts and neglect of the transfer agent or officers of said company in relation to such transfers and certificates, and have, in good faith, and without any violation on their part or in their knowledge of the by-laws and rules of the company, advanced money and other considerations on the faith of such transfers and certificates."

Geo. E. Comstock and William Tracy for the plaintiffs.

Charles O'Connor and C. A. Rapallo for the defendant Vanderbilt.

Mann & Rodman for Belmont, Hooper & Deane.

J. Larocque for Chauncy and wife, and Alsop.

W. Hutchins for Fisher, Denny & Co.

W. H. Peckham for J. Surget.

John M. Buckingham and D. D. Field for Ketchum & Bement.

Barlow & Kennedy for Rasbach & Crouse.

William M. Evarts for Edward Whitehouse.

Judah & Dickman for Henry Leger.

Weeks, De Forest & Foster for Talbot & Jones.

C. N. Potter for Brown Bros. & Co.

A. W. Lord for Ingraham & Dickinson.

D. D. Lord for Amos R. Eno.

J. S. Stearns for J. Milton Mackie.

Daniel Marvin for Ketchum & Patten.

W. Rutherford for De Coppet & Co.

John E. Parsons for William Wetmore and Thomas H. Faile.

DAVIS, J. . . . This somewhat summary disposition of the preliminary points of the case leaves an open path to its meritorious questions, some of which, however, may be disposed of even more summarily. One of these is the question whether the stock purporting to be created by the false certificates and fraudulent transfers of Schuyler can be valid stock of the corporation and become part of its capital. In the nature of things this is

impossible. A corporation with a fixed capital divided into a fixed number of shares can have no power of its own volition, or by any act of its officers and agents, to enlarge its capital or increase the number of shares into which it is divided. The supreme legislative power of the State can alone confer that authority and remove or consent to the removal of restrictions which are part of the fundamental law of the corporate being; and hence every attempt of the corporation to exert such a power before it is conferred, by any direct and express action of its officers, is void; and hence every indirect and fraudulent attempt to do so is void; for if such a result cannot be accomplished directly by the whole machinery of the corporate powers, it is absurd to suppose that it can be produced by the covert or fraudulent efforts of one or more of the agents of the corporation. The Special Term was, therefore, right in holding that the spurious stock attempted to be created by Schuyler in excess of the capital formed no part of the capital stock of the company, but was utterly invalid; and it necessarily followed from the decision of this court when the case was before it on demurrer, that the plaintiffs were entitled to have all certificates and transfers which represented such spurious stock declared void and ordered to be cancelled.¹

I shall proceed as briefly as possible to consider the cases of defendants, who are parties to this appeal, in the light of the different facts found in them; and for that purpose shall classify the defendants so far as practicable.

1. There is a class of defendants who were purchasers of stocks in good faith and for value, of persons to whose credit such stock stood on the books of the company at the transfer office at the time of such purchase, and who held certificates in due form therefor. On such purchases the outstanding certificates were surrendered, transfers made on the books in due form, and new certificates issued to the purchaser, who thereupon paid the purchase price to his vendor. These certificates are adjudged spurious because their origin is found to have been, more or less remotely, in over-issues by Robert Schuyler to his firm.

2. Another class are defendants who made purchases of parties who had credit on the books of the company for the stock sold, but no certificates, and who, on the sale, transferred the stock on the books in due form to the purchasers—who, in some instances, took certificates and in others not. In some cases in this class it is proved that the money for the stock was not paid till after inquiry at the office showed that the transfer had in fact been made.

¹ The remainder of the opinion should be considered in connection with the cases *infra*, pp. —ED.

3. Another class is of parties who loaned money upon certificates held by the borrowers, to whose credit the stock stood on the books of the company, and who at the time of making such loan or subsequently, surrendered the certificate and transferred the stock on the books and took out new certificates in due form.

The stock held by these two classes has been also adjudged spurious, because it originated in some like over-issue of the transfer agent.

It will be seen that in these cases where new certificates have been issued by the transfer agent the letter of his authority in its most limited sense has been pursued. The extrinsic facts upon which the power of the agent depended apparently existed. Stock stood on the books to the credit of the party making the transfer. The transfer was made in due form. The outstanding certificate was surrendered and cancelled, and thereupon the new one issued. To all appearance the act was within the real and apparent scope of the authority, and every condition of the power fully complied with. But a judicial investigation has shown that this apparent stock credited on the books was not real. That at some remote period it had its origin in a fraudulent over-issue. The question is, does the peril of that fact rest on the buyer? I think it does not; but I am constrained to admit that if the position of the appellants' counsel be sound, I do not see why it must not. The question is only carried back a step farther; that is, to the right of a dealer to buy stock, relying on the books of the company as evidence of the ownership of his vendor. But the books are themselves only representations made by agents, and by no means conclusive in every sense. The credit is a deceptive one, because the stock has no real existence, and if the condition of the power be that there must be an actual transfer of *stock*, an unreal transfer, however complete its resemblance to reality, does not answer the condition. No matter to what disastrous consequences the rule may lead, it cannot be satisfied without holding that the peril that all appearances of genuineness shall be founded in absolute fact constantly rests upon the dealer.

The same thing is true of the transfers upon the surrender of certificates, where no certificate had issued. Unless we are to hold the company to the duty of keeping correct books, so that those who refer to and rely upon them shall be protected, there is no remedy. The corporation may mislead the community until thousands are ruined, and be itself entirely protected by being able to say, our agents had no authority to give credits for stock where none existed. The evidence to a corporation of its stockholders is its stock ledger, or the books kept for the express pur-

pose of determining its stockholders. *Gray v. Portland*, 3 Mass. 385, per Sewall, J.

Dealers are entitled to rely upon that evidence. As was said by Best, Ch. J., in *Davis v. The Bank of England*, 3 Bingham, 393: "If this be not law, who will purchase stock, or who can be certain that the stock he holds belongs to him? It has ever been an object of the legislature to give facility to the transfer of shares in the public funds. This facility of transfer is one of the advantages belonging to this species of property, and this advantage would be entirely destroyed if a purchaser should be required to look to the regularity of the transfer to all the various persons through whom such stock had passed. Indeed, from the manner in which stock passes from man to man, from the union of stocks bought of different persons under the same name, and the impossibility of distinguishing what was regularly transferred from what was not, it is impossible to trace the title of stock as you can that of an estate. You cannot look further, nor is it the practice even to attempt to look further, than the bank books for the title of the person who proposes to transfer to you."

I take it to be sound law that if A., who is about to sell property to B. and take his check on a bank, applies at the counter of the bank to the proper officer, who informs him that B. has the funds in deposit and his check will be good, the bank will not be permitted to deny the truth of the assertion after A. has acted upon it, on the ground that its officer had no authority to keep any but correct books. But these parties stand upon a still better footing, for they have relied not merely upon a certificate issued by the agent, but upon the records of title to stock kept by the company, which were the only other existing sources of information. They have there found the stock they proposed to purchase credited to the party offering it for sale, in the stock ledger of the corporation, which is the best evidence of the existence of all genuine stock transferable at this office. Is it to be tolerated that the responsibility for the correctness of these books rests altogether upon dealers who have no control over them?

The defendants who have been led into loaning their money upon certificates and transfers held and made by parties who had like credits on the books, and who apparently complied with every condition, stand on the same footing with those just noticed. Public policy and the true interests of all parties concerned, as well as plain principles of equity and justice, require that the corporation make good the losses they have sustained.

There is still another class whose claims arise upon other facts, and rest on different principles. It is composed of those defendants who have received certificates representing actual and genu-

ine stock of the company, but whose certificates were rendered valueless by a subsequent transfer to *bona fide* purchasers of the same stock, by the party to whose credit it stood on the books. To this class belong a part of the certificates held by the defendant Vanderbilt; the certificates of Jacob Surget, those of Ketchum & Bement, a part of Schuchard & Gebhard's, and perhaps some others. These certificates have been held to be spurious, by which I understand the court to mean nothing more than that they became invalid as representatives of stock, after the same stock had got into the hands of other *bona fide* holders.

The case of Jacob Surget presents the question arising in this class with distinctness. On the 11th of December, 1852, he loaned to R. & G. L. Schuyler the sum of \$11,000, to secure which they delivered to him a certificate for 110 shares of the capital stock of the New York & New Haven Railroad Company, issued to them with the ordinary assignment and blank power of attorney endorsed thereon and duly executed by them. On the 2d of September, 1853, Surget loaned to that firm the further sum of \$9500 on the security of 110 other shares of such stock, the certificate for which was delivered to him with the proper assignment and power of attorney executed in blank by said firm. These certificates were genuine, and represented actual stock of the company then owned by the Schuylers and standing to their credit on its books.

On the 3d of November, 1853, Surget was, and had been from September, 1850, the owner of 200 shares of the stock of the company, for which he held its certificate. On that day he agreed with the Schuylers to sell to them this stock, and to loan them some \$7000, in security for which he was to hold 75 shares of the stock thus sold to them. He made the loan, and to carry out the arrangement transferred to them the 200 shares and delivered up his certificate, and at the same time received back a certificate for 75 shares issued to them at that time, with the proper and duly executed power of attorney. The stock represented by these several certificates was genuine, and no question is or can be made affecting the propriety or authority of the act of the officer in issuing the certificates.

Surget did not transfer the stock on the books, but retained the certificates in his possession, and his loans to the Schuylers remain for the most part unpaid. Afterward Schuyler & Co. transferred on the books all their stock to other parties, who were purchasers in good faith, and the outstanding certificates held by Surget were not surrendered nor accounted for.

In November, 1854, Surget presented his certificates at the transfer office of the company and offered to surrender them, and

requested permission to transfer the stock represented by them; but the company refused to receive the surrender or permit the transfer, on the allegation that the certificates did not represent genuine stock.

The plaintiffs have demanded and obtained a judgment declaring the certificates held by Surget to be void, and directing their cancellation. By his answer Surget insisted that his stock was, and should be declared to be, genuine, or that he should be awarded damages for the refusal of the company to recognize it as such.

The principal questions that present themselves in this case are:

1. Whether the subsequent purchasers in good faith of the stock acquired by the transfers on the books of the company a title superior to Surget's, under the certificates held by him; and,
2. If they did, whether the company are liable to him for permitting the transfers to be made without the production and surrender of the outstanding certificates.

The law, as settled by authority, touching the first of these questions is this: Where the stock of a corporation is by the terms of its charter or by-laws transferable only on its books, the purchaser who receives a certificate with power of attorney gets the entire title, legal and equitable, as between himself and his seller, with all the rights the latter possessed; but as between himself and the corporation, he acquires only an equitable title which they are bound to recognize and permit to be ripened into a legal title, when he presents himself, before any effective transfer on the books has been made, to do the acts required by the charter or by-laws in order to make a transfer. Until those acts be done he is not a stockholder, and has no claim to act as such; but possesses, as between himself and the corporation, by virtue of the certificate and power, the right to make himself, or whomsoever he chooses, a stockholder by the prescribed transfer. The stock not having passed by the delivery of the certificate and power of attorney, the legal title remains in the seller, so far as affects the company and subsequent *bona fide* purchasers who take by transfer duly made on the books. And hence a buyer, in good faith, of the person in whose name the stock stands on the books, who takes a transfer in conformity to the charter or by-laws, permitted to be made by the authorized officer of the corporation, becomes vested with a complete title to the stock, and cuts off all the rights and equities of the holder of the certificate to the *stock itself*. What other rights and equities he may possess is another question; but if the transferee has taken in good faith and for value, the stock is gone beyond his reach and beyond recall by the corporation. *Stebbins v. Phenix Fire Ins. Co.*, 3 Paige, 350; *Union*

Bank *v.* Laird, 2 Wheat. 390; Angel & Ames on Corp. 352, 353, 3d ed.; Mechanics' Bank *v.* New York and New Haven R. R. Co., 3 Kern. 621, *et seq.*, per Comstock, J.; Bank of Utica *v.* Smalley, 2 Cow. 770; Gilbert *v.* Manchester Iron Co., 11 Wend. 627; Borgegate *v.* Shortridge, 31 Eng. L. and Eq. 58; Wilson *v.* Little, 2 Comst. 447, per Ruggles, J.

The non-production and surrender of the certificate at the time of the transfer is not fatal to the title of the transferee. It is only essential to the safety of the corporation, and may be waived by it at its own peril. The company has the means of knowing whether a certificate of particular stock is outstanding or not and the power to compel its return and cancellation before any transfer is made, and a buyer, where the transfer is permitted by the corporation to be made on its books, by one to whose credit the stock is standing, has a right to presume that no certificate has issued, or if one has, that his vendor has duly surrendered it for cancellation.

It follows, therefore, that the stock represented by the certificates in Surget's hands passed to the subsequent *bona fide* transferees; and the company had neither the power nor right to permit it to be transferred to Surget on his subsequent demand. In my judgment, no action would lie against them for that refusal. It was, in effect, asking them to do what the law prohibited them from doing—to duplicate the shares represented by the certificates, with a knowledge that they had long before passed into other hands, where they were still in actual and potential existence. The rights of Surget, if he have any, must stand on other grounds than the refusal in November, 1854, to permit him to transfer stock which then legally belonged to others.

The second question is, whether the company are liable for permitting the transfers to be made, without the production and cancellation of the outstanding certificates, whereby Surget's equitable rights to the stock were cut off and lost. The question is first to be considered on the assumption that the company permitted the transfer. It has been seen that Surget's rights as between himself and the corporation were those of an equitable, and not legal, owner of the stock. It may be stated as a clear proposition that where notice of the rights of an equitable owner are brought home to a party to be affected by such rights, the remedies for a subsequent injury to those rights is complete and perfect; and so it cannot be doubted that if Surget had given the company actual and plain notice that he was the holder and owner of the certificates in his hands, the permitting of a subsequent transfer to another, under circumstances that caused the title of the stock to be lost to him, would have subjected the corporation to respond to him for the injury. But the company had not actual

notice; and hence it is essential in this view of the question to show that its relations to the holder of the certificates were equivalent to those of a party with notice. By its charter the corporation was authorized to make by-laws to regulate the transfer of its stock. It had done this by the adoption of by-laws, which, as we have seen, *ex proprio vigore*, prevented the legal title of stock from passing otherwise than by the prescribed mode of transfer; and as a part of these by-laws it had provided for the issuing of certificates to stockholders, in a form to be "appointed and directed" by the directors; had authorized transfers by power of attorney, and had expressly declared that when a certificate of stock had been issued to a stockholder, no transfer of the stock should thereafter be permitted without the surrender of said certificate. The board of directors had also prescribed a form of certificate which was thereafter invariably used, which declared that the stockholder was entitled to the number of shares named, and that they were transferable on the books of the company at the office named, "on the surrender of this certificate." They prepared and caused to be printed on the back of this form of certificate an assignment thereof, with a power of attorney to be executed in blank by the stockholder, for the purpose of facility of transfer. That this was a customary and long-established mode of making stock readily and profitably marketable was well known to the company, for its by-laws speak of it as "the usual form." Now, while the corporation could not give to a certificate of this kind negotiability in its legal commercial sense, it could and did approximate to that characteristic, as nearly as legally possible, for the purpose of making its stock more valuable by the ease with which its certificates could pass from hand to hand by simple delivery. It was never intended to lock up those instruments in the hands of the stockholders named in them—but to give to them every practicable facility as the basis of commercial transactions. And this was legitimate and proper, since it tended to enhance the value of the corporate franchise by making its stock a subject of easy investment and ready convertibility. But it was essential to make these certificates in a form to secure public confidence, and this could only be done by making them solemn assurances of rights. Hence, by its by-laws the corporation declared that the stock represented by them should never be transferred, except upon the delivery and cancellation of the certificate; and this provision, in effect, is embodied in the certificate itself. Armed with such instruments, it sent its stockholders into the commercial world with knowledge of the established usage of dealing on the faith of such certificates; and it addressed them, not to the stockholder himself, who had no need of the notice, but

to all men who should desire to participate in the advantages or profits of its franchise. It was to all such persons that it assured safety in purchasing the certificate, by declaring that the stock should only be transferred upon its surrender and cancellation. In this manner it courted and established privity between itself and every holder of the certificate, by asserting that his equitable title was safe, because nobody but he could transfer the legal title. It should be constantly borne in mind that the certificate now spoken of is a valid one, representing actual stock; and upon the transfer of such an one, a privity at once springs up upon the title he acquires from his vendor and his equities as against the corporation, through which every assurance of the instrument is addressed to him; and it is upon this principle that *Kortright v. Buffalo Commercial Bank*, 22 Wend., properly stands. When, therefore, the original stockholder to whom such a certificate has been issued comes to the corporation to transfer the stock, its books are notice to it that the certificate has been issued. The by-laws and the certificate are notice that it must be surrendered before the stock can be transferred, and its non-production is notice that it is not in possession of the party claiming to transfer. These facts operate as notice that some other party is its owner; and they put the corporation upon the inquiry that would lead ordinary sagacity to the truth; and this is equivalent in equity to actual notice of all the rights that inquiry might develop.

Again, the transfer agent had actual notice of the previous transfer of the certificates to the defendant, for he made the assignment to him. The effect of this fact was very fully discussed by the Supreme Court of Connecticut in *The Bridgeport Bank v. The N. Y. & N. H. R. R. Co.*, 30 Conn. 270. "Now their transfer agent knew" (said the court in that case), "when he allowed these transfers to other parties, that the stock had already been sold to a prior purchaser who held a legal certificate for it, and that it was a fraud on that party to allow the stock to be transferred to other parties so long as the certificate was not surrendered. The transfer agent, on allowing these transfers, was acting precisely within the scope of his official power, and his knowledge and fraud are, therefore, the knowledge and fraud of the defendants themselves. . . . The plaintiffs, it is said, should have given notice of their equitable title. But how should they have given such notice? Why, only to that officer of the company whose duties related to the transfer of their stock; that is, to their transfer agent, Robert Schuyler himself. But Robert Schuyler already had full knowledge of the fact, for he was the very party who sold the stock to the plaintiffs; and though a distinction may be made between the knowledge which he had as an in-

dividual, in which capacity he was acting in selling the stock, and the official knowledge which he would have acquired by a formal notice given to him as transfer agent of the company, yet practically this distinction is very unimportant. . . . Notice of such an equitable title is never required to be formally given. Actual knowledge, however required, is enough to affect an individual, and we entertain no doubt that this knowledge of Robert Schuyler is to be regarded as the knowledge of the defendants. It is to be observed, too, that Robert Schuyler was not merely the transfer agent of the defendants, but was at the same time the president of the company and one of its directors." If this reasoning be sound, the corporation in this case must be held chargeable with actual notice of Surget's equitable rights. Hence, in either view of this question of notice, on the assumption that the corporation consented to the transfer of the stock for which Surget held the certificates and power of attorney, it is chargeable with notice of his rights, and liable to respond for the injury its disregard of them has produced.

In *Pollock v. The National Bank*, 3 Seld. 274, it was held that where a bank had permitted the transfer of stock under a forged power of attorney and cancelled the original and issued a new certificate, the bank was liable to the real owner to replace his stock or pay him the value thereof. In that case there was undoubted good faith in the bank, the officers of which had been deceived by a forgery into doing the act which had produced the injury. In this case the assent could not have been in good faith, for it was in violation of an inherent law of the company's stock regulations, and no milder rule of liability could flow from it. *Davis v. Bank of England*, 2 Bing. 393; *Asby v. Blackwell*, 2 Eden Ch. 299.

But there is another and well-settled principle upon which a corporation that permits a transfer of stock under such circumstances should be held liable. It is this, that "all duties imposed upon a corporation by law raise an implied promise of performance." Per Nelson, J., *Kortright v. Buffalo Commercial Bank*, 20 Wend. 91-94. It was upon this principle that assumpsit was maintained in the case just referred to, and that Lord Mansfield denies a mandamus in *The King v. The Bank of England*, Doug. 523, to compel the bank to enter a transfer of stock on its books, on the ground that an action would lie for a complete satisfaction equivalent to specific relief. "The law supposes that the corporation promises or undertakes to do its duty, and subjects it to answer in a proper action for its defaults, whether of non-feasance or misfeasance." 3 Dane, 109; 5 *id.* 160.

In *Bank of Columbia v. Patterson*, 7 Cranch, 299, 305, 306,

Story, J., in an able, learned, and concise statement of the powers, duties, and liabilities of corporations, observed that "all duties imposed on them by law, and all benefits conferred at their request, raise implied promises for the enforcement of which an action may well lie." Per Putnam, J., in *Sargeant v. Franklin Ins. Co.*, 8 Pick. 98.

The action of assumpsit was brought in *Kortright v. The Buffalo Commercial Bank*, for a refusal to permit a party holding a certificate and power of attorney to transfer the stock on the books of the bank. It was held, for the purpose of sustaining that form of action, that the law imposed the duty to permit the transfer, and raised an implied promise in favor of the party holding the certificate that that duty should be performed. In this case it was a duty enjoined upon the corporation by its by-laws not to permit a transfer of the stock without the surrender and cancellation of the certificate which it had issued. That duty raises a promise in favor of the holder of the certificate that it shall not be done. On the face of the certificate is a notice to all parties that the instrument must be surrendered upon making a transfer, and I think it would be straining no principle of law to say that the contents of the certificate are an assurance amounting to a promise that this rule shall be adhered to for the benefit of the equitable owner of the stock. The court went much farther in the *Bridgeport Bank* case, above referred to, and held that "the *bona fide* holders of such certificates had a right to rely on the certificates under the circumstances as securing to them the stock which they represented against all transfers to other parties." 30 Conn. 270.

If the corporation, therefore, permitted the transfer of the stock of which Surget was the equitable owner, in violation of its undertaking to protect his rights, the law gives him a remedy to the extent of the injury, upon the implied promise to do no such act to his prejudice.

But it is claimed, as an answer to this alleged liability, that the transfer was made or permitted by an agent of the company, who acted in excess of his powers. Clearly, it was the duty of the transfer agent to have required the surrender and cancellation of the outstanding certificates. That was one of the very duties he was put there to perform. He failed to do it, to the injury of Surget; and it is the very ground of the company's liability that its agent failed to do the duty enjoined upon him. The parties were dealing all the while in the actual and legitimate stock of the company, and the agent was called upon to do an act within the exact scope of his authority. An engineer is strictly prohibited to cross a drawbridge without seeing that signals of safety

are given. He drives heedlessly on when no signals are given. This is a plain breach of duty and excess of power, but on that exact ground the corporation are liable to every party injured. So here the agent disobeyed the rule and made the transfer; but he made it effectual to the injury of Surget. Who shall suffer, the innocent holder of the certificates, or the employer of the faithless servant whose breach of duty has caused the loss? In *Pollock v. National Bank*, *ubi sup.*, the officer who permitted the transfer clearly had no authority to do so on a forged power of attorney. But the bank was held chargeable with the consequences of his act, when it refused to recognize the plaintiffs as the owners of the stock. Certainly this must have been on the principle that the bank was chargeable with its officer's negligence in permitting the transfer on the forged power. "For where a trust," says Lord Holt (12 Mod. 472, 490), "is put in one person, and another, whose interest is intrusted to him, is damnified by the neglect of such as that person employs in the discharge of that trust, he shall answer for it to the party damnified." Nor does it matter that the agent fraudulently neglected his duty for his own private gain; for then arises the exact case for the application of Lord Holt's rule, that when one of two innocent persons must suffer from the fraud or misconduct of a third, he who has reposed a trust or confidence in the fraudulent agent ought to bear the loss.

But there is another answer to this position. The plaintiffs insist, and have procured the court to adjudge, that the transfer permitted or made by their officers has cut off Surget's equitable title to the stock, and on that ground to declare his certificates to be nullities. For this purpose, and to this extent, they ratify the act of the agent and the record of transfer; but the corporation must take the act with all its consequences or reject it utterly. They cannot affirm in part, and disaffirm as to the residue. *Bennett v. Judson*, 21 N. Y. 238; *Story Agency*, sec. 250; *Hovenden on Fraud*, 144, 145; 2 *Denio*, 261. And so, when the plaintiff seeks to annul valid certificates of stock on the ground that an effective transfer of the title to a *bona fide* purchase had been made on their books, they affirm the validity of that transfer as to all of its consequences, and are not to be heard to say that the agent who permitted it gave it validity so far as it injured the holder of a genuine certificate, but no effect in so far as it would have given a remedy for the injury. On these grounds, it seems to me, the plaintiffs were clearly liable to Surget; and the court very properly may apply the rule that he who seeks equity must do equity. It is through a particular and gross wrong of their agent that the plaintiffs' equity is sought, and the same wrong entitles the defendant to relief. . . .

It follows from these views that the judgment in favor of Jacob Surget should be affirmed with costs, and the order dismissing his appeal be reversed and the appeal heard under the stipulations, and the judgment on his appeal affirmed with costs against him.

The case of the defendants Morris Ketchum and Edward Bement, survivors, etc., upon the merits presents substantially the same question as that of Jacob Surget. The certificates upon which they claim are adjudged to be spurious and void. They were issued on the 1st of July, 1854; but it appears that they were made upon the surrender and cancellation of several other certificates long previously issued to R. & G. L. Schuyler, and by them assigned with the power of attorney duly executed in blank. The court has found that these last-named certificates, when issued, were genuine, and represented actual stock of the corporation standing to the credit of the Schuylers on its books; and that afterward, and before the transfer and issuing of the new certificates of July 1, the stock represented by those certificates was transferred on the books by the Schuylers to *bona fide* purchasers.

If the views suggested in Surget's case be sound, the certificates of July 1, 1854, were properly set aside and ordered to be cancelled by the court, for the stock represented or called for by them had become the property of other and innocent parties. But this fact did not affect the right of these defendants to insist upon compensation for the injury sustained by permitting the transfer without the surrender of the certificates in their possession. They were entitled to recover on the same grounds indicated in Surget's case, and should have been awarded their damages. . . .

The judgments against the plaintiffs, I think, ought to be affirmed on the general grounds above discussed; and the judgment in favor of plaintiffs affirmed, except as to Ketchum and Bement, in whose favor there should be a reversal, and a new trial ordered, with costs to abide event.

DENIO, C. J.; WRIGHT, POTTER, and BROWN, JJ., concurred with DAVIS, J.

Judgment affirmed.

MACHINISTS' NATIONAL BANK *v.* WILLIAM N. FIELD
AND OTHERS.IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS, MARCH 3,
1879.

[Reported in 126 Massachusetts 345.]

BILL IN EQUITY against William N. Field, a broker, Joseph P. Hawes and Francis Henshaw, auctioneers under the firm of Hawes & Henshaw, and Theodore Dean. Hearing before AMES, J., who reported the case upon the pleadings and the following facts, for the entry of such decree as, in the opinion of the full court, the case might require :

Elizabeth W. Pratt was the owner of twelve shares of the capital stock of the plaintiff bank, for which she held a certificate, dated October 15, 1875, and this certificate was taken from her house without her knowledge by Charles C. Pratt, and, with a forged power of attorney, delivered to the defendant Field, who employed Hawes & Henshaw to sell the twelve shares by auction : and they sold the same, on March 8, 1876, to Dean, for \$1920. On March 10, 1876, Field called on Hawes & Henshaw, for the proceeds of the sale, and they informed him that, in accordance with their practice, they would pay over the same on receiving from the bank a certificate of the shares ; and thereupon Field, believing the power of attorney to be genuine, sent the certificate, with the forged power of attorney, to the bank, with a letter, requesting a transfer of the shares to Hawes & Henshaw. The president of the bank, believing the power of attorney to be executed by Elizabeth W. Pratt, inserted his own name therein as attorney, and transferred the twelve shares to Hawes & Henshaw, and issued a certificate therefor to them, and sent this certificate to Field, who delivered it to Hawes & Henshaw, and they paid him the proceeds of the sale less \$1.50, their commission for selling. Hawes & Henshaw delivered this certificate to Dean with a power of attorney to transfer the same, and Dean paid them therefor \$1920. Dean, who was then the holder of a certificate for forty-three shares of said stock, executed an assignment of the twelve shares to himself ; and, upon the surrender of the respective certificates for forty-three shares and twelve shares, the bank issued to him a certificate for fifty-five shares, which he now holds. The bank paid to Dean the dividend declared in April, 1876. Field, on March 13, 1876, paid to Charles C. Pratt the amount received by him from Hawes & Henshaw, less \$1.50, his commission as broker on the sale.

Neither Hawes & Henshaw nor Dean ever saw the certificate of the shares in the name of said Elizabeth W. Pratt, nor the power of attorney under which the same were transferred, or ever knew or heard that she was the owner of the same, or who was the owner of the same till after the issue by the bank of the certificate to Hawes & Henshaw, and until after the transfer and issue of the certificate to Dean.

Field acted in good faith in the sale of the shares, and there was no evidence that he had any knowledge or suspicion of the forgery of the power of attorney, and he never made any representation to the bank or its president, or had any communication with either, except the letter above referred to.

Elizabeth W. Pratt, in June, 1876, filed a bill in this court against the bank, praying that said twelve shares might be re-issued to her, and obtained a decree ordering the bank to "procure and transfer to the plaintiff her twelve shares of the capital stock of the defendant corporation, as described in the bill, and make and deliver to the plaintiff a proper and legal certificate for the same, and make a proper and legal record upon the books of said corporation of said transfer and certificate;" and also to pay to the plaintiff the dividends declared upon the twelve shares. See 123 Mass. 110. The bank reissued to Elizabeth W. Pratt a certificate for her twelve shares, and there are now outstanding, issued by the bank, certificates for twelve shares more than the authorized capital.

The present bill concluded thus: "Wherefore, inasmuch as there are now two different parties claiming distinct rights or interests in the same stock, which cannot be justly and definitely decided in an action at law, and whereas there is no plain, adequate and complete remedy at the common law, but the same is properly cognizable only in a court of equity, the said bank brings this bill in equity, and prays for a decree that said Field and said Hawes & Henshaw may be ordered to repay the said bank the amount so received from said Dean for said twelve shares of stock, that said bank may return the same to said Dean, or to repay the same to Dean directly; and that he may be ordered to surrender to said bank his said certificate of fifty-five shares, and retake his former certificate of said forty-three shares before owned by him, and all parties restored to their former position; or that such other orders and decrees may be made as law and justice may require, or as to your honors may seem meet;" with a prayer for process.

E. H. Bennett & H. J. Fuller for the plaintiff.

Jabez S. Holmes for Field.

A. S. Wheeler for the other defendants.

GRAY, Ch. J. This bill cannot be maintained. The sole ground on which it invokes jurisdiction in equity is that "there are now two different parties claiming distinct rights or interests in the same stock, which cannot be justly and definitely decided in an action at law;" and the relief specifically prayed for is that Dean may surrender to the plaintiff bank the certificate of the new shares issued by it to him, and that Field and Hawes & Henshaw may be ordered either to repay to the plaintiff the money received by Hawes & Henshaw from Dean for these shares, so that the plaintiff may return that money to Dean, or else to repay the money to Dean directly.

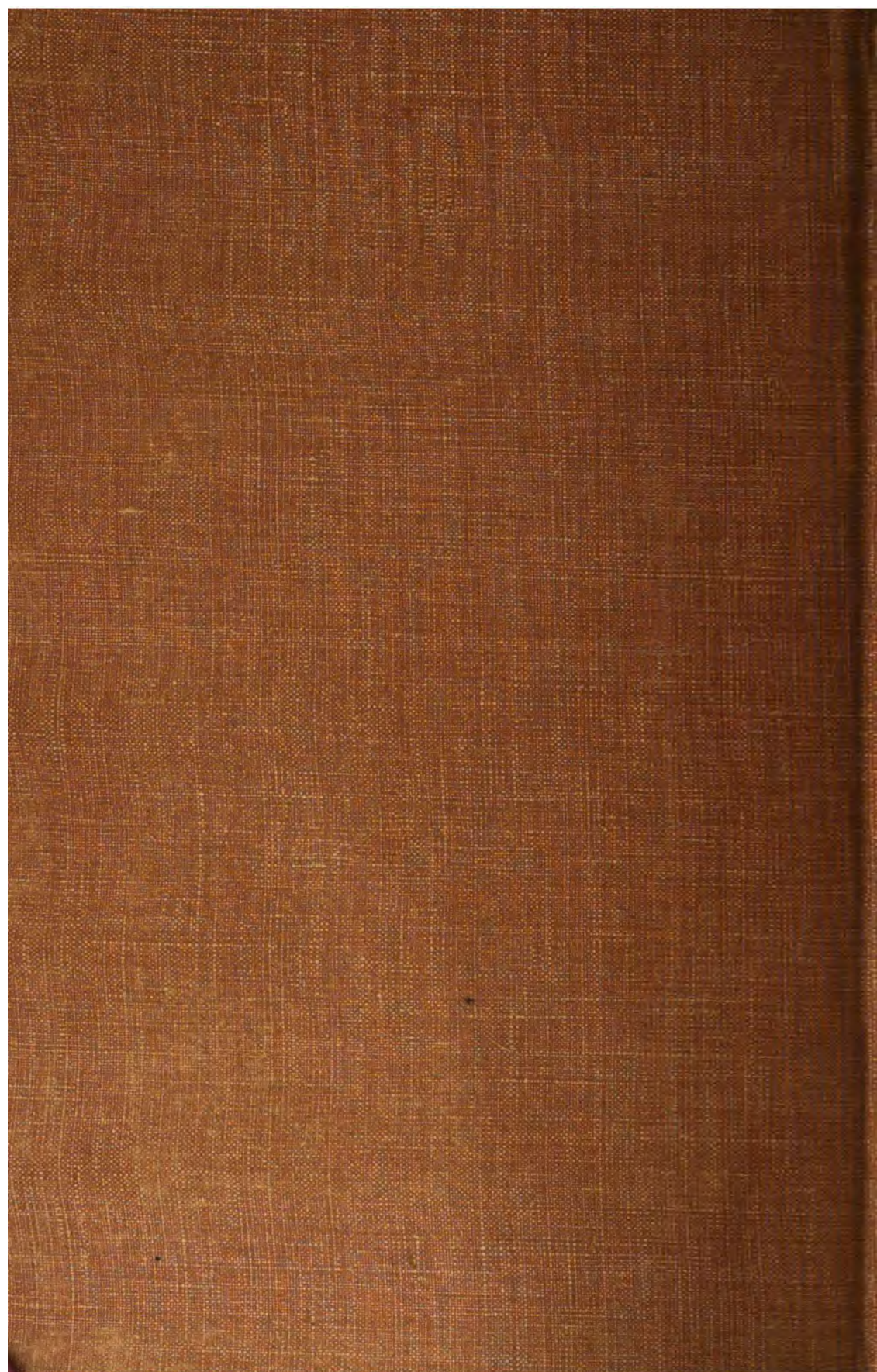
Dean cannot be ordered to return his certificate, because he purchased the shares in good faith and for valuable consideration, and the certificate issued to him is as against the bank conclusive evidence of his title. The bank has no right to compel him rather than any other stockholder to give up his certificate and thereby assume the responsibility of its own illegal act in issuing a greater number of shares than the law authorized. *Salisbury Mills v. Townsend*, 109 Mass. 115, 122. *Pratt v. Machinists' Bank*, 123 Mass. 110, 112. *Lowry v. Commercial and Farmers' Bank*, Taney, 310, 328. *In re Bahia and San Francisco Railway, L. R.* 3 Q. B. 584. *Holbrook v. New Jersey Zinc Co.*, 57 N. Y. 616. The relief specifically prayed for against Field and against Hawes & Henshaw is for Dean's benefit, and contingent upon his being ordered to surrender his certificate, and, as he is not bound to do so, he has no claim to be repaid any money by either of the other defendants.

The general relief prayed for must be confined to the ground of jurisdiction stated in the bill; and it is quite clear that there are not two parties before the court, claiming distinct rights or interests in the same stock. Mrs. Pratt is not a party, but has obtained her rights in her former suit against the bank. The only party claiming the shares in question is Dean, whose title, as we have seen, this plaintiff cannot controvert. Hawes & Henshaw claim no title in the stock, and are protected, equally with Dean, by the certificates issued to them by the plaintiff. Field also has and claims no title in the stock, and if, by reason of his having presented to the bank the forged power of attorney upon which the new certificates were issued, he is liable to the bank in any form (of which we give no opinion), the bank has an adequate remedy against him alone by action at law.

Bill dismissed, with costs.

- 1) not in a valid legal state by U.S. courts
- 1) if in cases of dissolving partnership, no more
except articles except the state
- 2) if . Bell's & rules
- 3) if . when a corporation takes a debt and
agreement to collect.

By laws. can his time & place of meetings, and
conduct meetings, how notice of meeting must
be served, whether a member may vote by proxy,
direct vote or in of proceedings, determine the
number of directors of the corporation and contain
a provision to the contrary, quorum



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